Supreme Court, U.S.
FILED

(1)

No. 00— 001496 MAR 28 2001

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICHAEL J. BROWN,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK D. ROTH
General Counsel
CHARLES A. HOBBIE
Deputy General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6424

KEVIN M. GRILE *
Assistant General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
449 North Clark Street, Ste. 300
Chicago, Illinois 60610
(312) 645-1803

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

83pp

QUESTION PRESENTED

Whether, in the absence of any evidence of a negative impact on the employee's job responsibilities, an employing agency may remove a federal civilian employee for lawful, off-duty conduct, not arising from the employee's job duties, based on the unsubstantiated claims of agency officials, reflecting their personal mores, that they have lost trust and confidence in the employee's performance?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Factual Background	2
B. The MSPB Proceedings	4
C. The Federal Circuit's Decision	6
REASONS FOR GRANTING THE PETITION	7
A. The Decision of the Court Below Allows A Federal Civilian Employee To Be Removed For Lawful Off-Duty Conduct Unrelated to the Employee's Job Responsibilities Solely On Claims Of a Loss Of Trust Or Confidence Reflecting The Mores of Agency Officials	8
1. The Question At Issue Is Important	8
2. The Opinion and Order Below Are Wrongly Decided	11
B. The Federal Circuit's Application of the Nexus Requirement Conflicts With the Standards Established By Other Federal Appellate Courts For the Application of the Nexus Requirement	17
CONCLUSION	21

TABLE OF CONTENTS—Continued

APPENDIX Page

A. Opinion of the United States Court of Appeals for the Federal Circuit, October 20, 2000 ..... 1a

B. The United States Court of Appeals for the Federal Circuit's Denial of the Petitioner's Combined Petition For Panel Rehearing and For Rehearing *En Banc*, December 28, 2000 ..... 26a

C. Order of the Merit Systems Protection Board in *Brown v. Department of the Navy*, MSPB Docket Number DC-0752-97-1018-I-1, August 10, 1999 ..... 27a

D. Initial Decision of Merit Systems Protection Board Administrative Judge Michelle M. Hudson in *Brown v. Department of the Navy*, MSPB Docket Number DC-0752-97-1018-I-1, January 2, 1998 ..... 35a

E. Relevant Statutory Provisions 51a

TABLE OF AUTHORITIES

CASES: Page

Allred v. Department of Health and Human Services, 786 F.2d 1128 (Fed. Cir. 1986) 9, 10, 13, 15
Arnett v. Kennedy, 416 U.S. 134 (1974) 18
Barnes v. Small, 840 F.2d 972 (D.C.Cir. 1988) 18
Birnholz v. United States, 199 Ct. Cl. 532 (1972) 13
Bonet v. United States Postal Service, 661 F.2d 1071 (5th Cir. 1981) 15, 19
Brook v. Corrado, 999 F.2d 523 (Fed. Cir. 1993) 9, 10
Brown v. Department of the Navy, 83 M.S.P.R. 230 (1999), *pet. for rev. den.*, 229 F.3d 1356 (Fed. Cir. 2000) 1
Brown v. Department of the Navy, 229 F.3d 1356 (Fed. Cir. 2000) ..... *passim*
D.E. v. Department of the Navy, 721 F.2d 1165 (9th Cir. 1983) 15, 19
DeLeonardis v. Weiseman, 986 F.2d 725 (5th Cir.), *cert. den.*, 510 U.S. 817 (1993) 19
Doe v. Hampton, 566 F.2d 265 (D.C.Cir. 1977) 9
Giles v. United States, 553 F.2d 647 (Ct.Cl. 1977) 10, 12-13
Gloster v. General Services Administration, 720 F.2d 700 (D.C.Cir. 1983) 9, 19
Gregory v. United States Postal Service, 212 F.3d 1296 (Fed. Cir. 2000), *cert. granted sub. nom., United States Postal Service v. Gregory*, No. 00-758 (U.S. Feb. 20, 2001) 16-17
Masino v. United States, 589 F.2d 1048 (Ct.Cl. 1978) 10, 13
Merritt v. Department of Justice, 6 MSPB 493, 6 M.S.P.R. 585 (1981) 15

TABLE OF AUTHORITIES—Continued

	Page
Morales v. Merit Systems Protection Board, 932 F.2d 800 (9th Cir. 1991)	18
Norton v. Macy, 417 F.2d 1161 (D.C.Cir. 1969)	9
Phillips v. Bergland, 586 F.2d 1007 (4th Cir. 1978)	19, 20
Wild v. United States Department of Housing and Urban Development, 692 F.2d 1129 (7th Cir. 1982)	13-14, 20
Williams v. Department of the Army, 715 F.2d 1485 (Fed. Cir. 1983) (*en banc*)	18
Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977)	19
STATUTES:	
5 U.S.C. 2302(b)(10)	13-14, 20
5 U.S.C. 7513(a)	*passim*
5 U.S.C. 7513(d)	4
5 U.S.C. 7701(a)	4
5 U.S.C. 7703(a)	6
5 U.S.C. 7703(b)	17
5 U.S.C. 7703(b)(1)	6, 16
5 U.S.C. 7703(b)(2)	16,18
28 U.S.C. 1254(1)	2
28 U.S.C. 1295(a)(9)	6
The Federal Courts Improvement Act of 1982, Pub. L. 97-164, 96 Stat. 25 (1982)	17

IN THE

Supreme Court of the United States

MICHAEL J. BROWN,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Michael J. Brown (Brown) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion and order of the court of appeals that is the subject of this petition may be found at *Brown v. Department of the Navy*, 229 F.3d 1356 (Fed. Cir. 2000), and is also set forth at Appendix (App.) 1a-25a. The unpublished order of the court of appeals denying Mr. Brown's combined petition for panel rehearing and for rehearing *en banc* is set forth at App. 26a. The final order of the Merit Systems Protection Board (MSPB) that was reviewed by the court of appeals may be found at *Brown v. Department of the Navy*, 83 M.S.P.R. 230 (1999). App. 27a-34a. The unpublished initial decision of the MSPB administrative judge that was reviewed by the MSPB is set forth at App. 35a-50a.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2000. App. 1a. A combined petition for panel rehearing and for panel rehearing *en banc* was denied on December 28, 2000. App. 26a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision directly involved in this case is 5 U.S.C. 7513(a), which states:

> Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

Other statutory provisions with pertinence to this case are reproduced in the appendix beginning at page 51a.

STATEMENT OF THE CASE

A. The Factual Background

A number of years prior to petitioner Brown becoming a federal civilian employee, Mr. Brown was a Marine officer stationed at Quantico, Virginia. App. 29a, 37a. While stationed at Quantico, Mr. Brown and his wife became acquainted with Major B, another Marine officer, and his wife (hereinafter Mrs. B). App. 29a-30a, 37a. Shortly thereafter, Mr. Brown resigned from active duty with the Marine Corps, but remained an officer in the Marine Reserves. App. 30a, 37a-38a. Mr. Brown also became divorced from his wife. App. 38a.

By 1995, Mr. Brown had relocated to the Jacksonville, North Carolina area. App. 30a, 38a. In approximately April of 1995, Mr. Brown obtained *civilian* employment with the Marine Corps at Camp Lejeune. *Id.* Mr. Brown was employed as a GS-9 Program Manager with the Morale, Welfare and Recreation (MWR) Department. App. 29a, 35a. Mr. Brown's primary job responsibility as a Program Manager was to

coordinate special social events for military personnel and family members at Camp Lejeune. App. 2a, 16a-17a. This job involved administrative, planning and budgetary duties and very little contact with the spouses of Marines. App. 32a. Mr. Brown's Program Manager duties did not involve any counseling of Marines or their family members on personal or family problems. App. 16a.

Independently, Major B was stationed at Camp Lejeune and social contacts between Major and Mrs. B and Mr. Brown resumed. App. 30a, 38a. Between August, 1995, and February, 1996, Major B was deployed overseas with his Marine unit. App. 38a. It was found in the proceedings below that Mr. Brown, during the limited period of Major B's deployment, participated in a private, consensual and off-duty romantic affair with Mrs. B. App. 14a, 30a, 34a, 38a, 39a, 42a.

No evidence exists in the record to indicate that any romantic affair between Mr. Brown and Mrs. B resulted from any misuse by Mr. Brown of his civilian job with the Marines. App. 9a, 14a-15a, 32a-33a. There is no evidence either that any romantic affair between the two persons resulted for any reason other than a special affinity between the two persons, or that Mr. Brown is more predisposed to engage in a romantic affair in the future with the spouse of a Marine than any other person. Any affair involving Mr. Brown and Mrs. B also did not adversely affect Mr. Brown's job performance. App. 15a, 31a. Mr. Brown received an excellent performance appraisal for the period of time in which the affair purportedly occurred. *Id.*

In approximately January of 1997, nearly a year following the termination of the purported affair, Major B was informed of the purported affair between Mrs. B and Mr. Brown. App. 38a. Major B reported the affair to the Marine Corps so that action could be taken relative to Mr. Brown's status as an officer in the Marine Reserves. *Id.* However, in addition to actions taken against Mr. Brown in his status as a military officer, the Marine Corps also removed Mr. Brown from his civilian job position,

effective August 11, 1997, on a charge of "improper personal conduct" based on the purported romantic affair between Mr. Brown and Mrs. B. App. 1a, 29a, 36a.

B. The MSPB Proceedings

In accordance with 5 U.S.C. 7513(d) and 7701(a), Mr. Brown timely appealed the decision removing him from federal civilian employment to the Merit Systems Protection Board (MSPB). Soon thereafter, a hearing on Mr. Brown's civilian removal was held before an MSPB administrative judge. In this hearing, the employing agency offered the testimony of a number of persons in order to justify a finding of "nexus" between Mr. Brown's purported conduct and Mr. Brown's job responsibilities. Functionally, each person's testimony consisted of opinion as to how the conduct attributed to Mr. Brown affected the operations of the MWR Department. An MWR operations officer expressed the view that the incident attributed to Mr. Brown took credibility away from the MWR Department. App. 5a. A "key volunteer coordinator" (in this case, the spouse of a military commander serving as a contact person for the Program Manager in the planning of events) asserted in testimony that the conduct attributed to Mr. Brown put her program in a "less than favorable light." *Id.*

The Assistant Chief of Staff of the MWR Department at Camp Lejeune testified that the conduct attributed to Mr. Brown undercut the integrity of the organization and that it was likely that a Marine unit commander with knowledge of the purported conduct would request that Mr. Brown not provide service to his unit. App. 5a-6a. A family readiness officer for a Marine unit testified that it was important for deployed Marines to trust the MWR program managers. App. 6a. Finally, a commander of a Marine unit testified that, if military commanders bypassed the MWR Department, it would degrade the efficiency of the MWR operation. *Id.*

In an initial decision issued on January 2, 1998, the MSPB administrative judge (AJ) affirmed the employing agency's

action removing Mr. Brown from civilian employment. App. 35a-50a. After finding that a romantic affair between Mr. Brown and Mrs. B occurred (App. 37a-42a), the AJ then addressed the question of whether there is a sufficient "nexus" between the off-duty conduct attributed to Mr. Brown and the "efficiency of the service" as required by 5 U.S.C. 7513(a). App. 42a-48a. Citing the various grounds on which the MSPB has concluded that an employing federal agency may show a nexus between off-duty conduct and the "efficiency of the service" (App. 42a-43a), the AJ concluded that a nexus finding is appropriate based on evidence that the purported conduct "affected management's trust and confidence in his job performance," and on evidence that the purported conduct "interfered with and adversely affected the agency's mission." App. 43a. Finally, the AJ concluded that the selection of removal as a penalty by the employing agency was reasonable. App. 48a-50a.

Pursuant to MSPB regulations, Mr. Brown timely petitioned for review of the AJ's initial decision by the full MSPB. In an order of the MSPB dated August 10, 1999, a two member majority of the MSPB denied Mr. Brown's petition for review. App. 27a. The MSPB order indicated that the AJ's initial decision constitutes the final decision of the MSPB. *Id.*

MSPB Vice Chair Slavet issued a dissenting opinion on the MSPB's denial of Mr. Brown's petition for review. App. 29a-34a. In her dissent, Vice Chair Slavet first argued that the evidence on the alleged loss of agency trust and confidence in Mr. Brown's job performance is "both general and speculative." App. 32a. Vice Chair Slavet observed that Mr. Brown, in his civilian capacity, is not a Marine and is not subject to the Marine Corps' standards of behavior for military members. *Id.* Vice Chair Slavet further observed that there was no evidence that co-workers or Marine families were concerned with the purported conduct, that Mr. Brown's duties required little, if any, contact with the wives of deployed Marines, that Mr. Brown's conduct neither arose out of nor was related to his

duties, and that the conclusory statements of agency officials did not demonstrate that Mr. Brown could not carry out his responsibilities. App. 32a-33a. Vice Chair Slavet also argued in dissent that the employing agency failed to show that Mr. Brown's purported conduct was directly opposed to the agency's mission. App. 33a-34a. In this regard, Vice Chair Slavet observed that the theory that deployed Marines could worry about their marriages while they are deployed was speculative, particularly in light of the facts that the affair was long terminated, was private and consensual when it occurred, and did not arise out of Mr. Brown's employment. *Id.*

C. The Federal Circuit's Decision

Pursuant to 5 U.S.C. 7703(a) and (b)(1) and 28 U.S.C. 1295(a)(9), Mr. Brown filed a timely petition for review of the MSPB's final decision and order with the United States Court of Appeals for the Federal Circuit. In a decision dated October 20, 2000, a panel of the Federal Circuit, by a 2-1 vote, affirmed the MSPB's decision. App. 1a-25a. After describing the record below, the Federal Circuit majority held that "substantial evidence supports the [AJ's] finding of a nexus between Mr. Brown's misconduct and both the mission of the agency in general and his job responsibilities in particular." App. 7a. In justifying this conclusion, the Federal Circuit majority asserted that "the *trust and confidence* of the Marine families and the Marine commanders served by MWR was essential to MWR's proper functioning and to Mr. Brown's performance of his duties within MWR" and that "the necessary *trust and confidence* was undermined by conduct of the sort at issue in this case." *Id.* (emphasis added). The Federal Circuit majority also rejected a claim that the standards applied to military officers should not be the basis for standards applied to Mr. Brown's civilian employment. App. 11a. Finally, the Federal Circuit majority also upheld the employing agency's decision to choose removal from civilian employment as a penalty for Mr. Brown's purported misconduct. App. 12a-13a.

Circuit Judge Linn dissented from the panel majority's opinion. App. 14a-25a. In his dissent, Judge Linn opined that the panel majority "has stretched the nexus requirement so thin that [Mr.] Brown has become subject to the moral judgments of the employer" and that personnel decisions on such a basis are "an improper role for the government." App. 14a. Addressing the factual context of this case, Judge Linn opined that the panel majority gave inadequate weight to the fact that Mr. Brown knew Mrs. B before Mr. Brown began his civilian employment and to the fact that any relationship between the two had no causal connection with Mr. Brown's civilian employment. App. 14a-15a. On the MSPB rationale that a nexus could be found between the purported conduct and Mr. Brown's job responsibilities based on a loss of "trust and confidence" by agency management, Judge Linn noted that "all of the evidence adduced at the [MSPB] hearing was conjectural, speculative or unrelated to Mr. Brown's job responsibilities." App. 16a. Judge Linn observed that the majority's opinion could be read "as sanctioning the removal of an employee simply because of a difference in values between that employee and his superiors," and that "[i]f this evidence was enough to warrant removal, then no employee is safe from the threat of removal." App. 18a. Judge Linn similarly found that evidence of a nexus based on a "mission impairment" was lacking and could not be justified in the absence of evidence of a connection between the purported conduct of Mr. Brown and his job performance. App. 21a.

Following the panel decision, Mr. Brown timely filed a combined petition for panel rehearing and for rehearing *en banc* with the Federal Circuit. By order dated December 28, 2000, the Federal Circuit denied the combined petition. App. 26a.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to resolve an important question of federal law that has not been, but should be, settled by this Court. Specifically, this case presents the question of whether, in the absence of any evidence of a negative impact on

the job responsibilities of a federal civilian employee, an employing agency may remove the employee for lawful, off-duty conduct based on claims of a purported loss of trust or confidence that reflects the mores of agency officials. In addition, this Court should grant this petition because the Federal Circuit's application of the nexus requirement conflicts with the standards established by other federal appellate courts for the application of the nexus requirement.

A. The Decision of the Court Below Allows A Federal Civilian Employee To Be Removed For Lawful Off-Duty Conduct Unrelated to the Employee's Job Responsibilities Solely On Claims Of A Loss Of Trust Or Confidence Reflecting The Mores of Agency Officials

1. The Question At Issue Is Important

This case presents an important question of federal law. Mr. Brown's removal was based on an off-duty romantic relationship which arose independently of Mr. Brown's job duties. Yet a panel majority of the Federal Circuit concluded that a nexus between the off-duty affair and Mr. Brown's job responsibilities has been established. Thus, at issue in this case is the scope of the "nexus" requirement in federal employee disciplinary cases.

Under 5 U.S.C. 7513(a) (Section 7513), an employing federal agency may take a removal action against an agency employee "*only* for such cause as will promote the *efficiency of the service*" (emphasis added). Because the agency's authority to impose discipline is tied to the "efficiency of the service," any discipline for an employee's off-duty activities must be based on a connection between the off-duty activities and the "efficiency of the service." This connection is known in federal employment law as a "nexus."

The nexus requirement serves as an important restriction on the federal employer involving itself in the private lives of its

employees. Through use of the term "only," Section 7513 expressly limits the disciplinary power of an employing federal agency to those instances in which discipline is for such cause as will promote the efficiency of the service. In other words, the authority of agencies to take disciplinary actions "is at least confined to the things which are Caesar's." *Norton v. Macy*, 417 F.2d 1161, 1165 (D.C.Cir. 1969). The nexus requirement thus "serves to minimize unjustified governmental intrusions into the private activities of federal employees." *Doe v. Hampton*, 566 F.2d 265, 272 n. 20 (D.C.Cir. 1977). The purpose of the nexus requirement is therefore clear. As stated by the D.C. Circuit, "the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy and diversity." *Norton*, *supra*, 417 F.2d at 1165.

Because an employee's off-duty activities will normally not implicate job considerations, "[t]he nexus requirement is particularly strict in cases involving non-work related misconduct." *Gloster v. General Services Administration*, 720 F.2d 700, 703 (D.C.Cir. 1983). The Federal Circuit itself, at least prior to the present case, has implicitly noted this limitation of the nexus requirement on agency discipline of employees. Thus, the Federal Circuit has consistently described the nexus requirement as compelling an agency showing of a connection between the employee's off-duty misconduct and the employee's "job-related responsibilities." *E.g., Allred v. Department of Health and Human Services*, 786 F.2d 1128, 1130 (Fed. Cir. 1986); *Brook v. Corrado*, 999 F.2d 523, 527 (Fed. Cir. 1993); *see also* 5 U.S.C. 2302(b)(10) (making it a "prohibited personnel practice" for an agency to "discriminate . . . against any employee . . . on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others").

Generally, those cases in which a nexus has been found between off-duty misconduct and an employee's job-related

responsibilities involve serious (and usually, if not always, criminal) conduct which clearly brings the effectiveness of the employee's future job performance into question. *E.g., Brook, supra* (removal of technician responsible for entire electrical system at NASA's Goddard Space Flight Center based on off-duty conviction of cocaine possession with intent to distribute); *Allred, supra*, 786 F.2d at 1131 (removal of employee responsible for monitoring programs for the benefit of children based on off-duty conviction for child molestation); *Masino v. United States*, 589 F.2d 1048, 1056 (Ct.Cl. 1978) (removal of Customs official responsible for excluding illegal drugs from the United States based on off-duty marijuana use); *Giles v. United States*, 553 F.2d 647, 650 (Ct.Cl. 1977) (removal of Internal Revenue Service agent responsible for the collection of delinquent tax payments and filings for failure to file personal tax returns in a timely manner). It is *not* petitioner's position that an employee's off-duty activities are always beyond the scope of the federal employer's disciplinary considerations. However, the cases just cited involve such a close correlation between the subject off-duty activities and the employee's job-related responsibilities that the federal employer's right to discipline for those activities cannot be meaningfully disputed.

By contrast, the Federal Circuit's decision in the present case displays such an expansive view of the activities which can fall within the nexus requirement that, if the rationale of the present decision is logically extended, the nexus requirement will be effectively nullified. Any affair between Mr. Brown and Mrs. B arose from contacts that predated Mr. Brown's civilian employment and Mr. Brown never used his civilian position to facilitate any affair with Mrs. B. Yet as will be explained *infra*, the panel majority of the Federal Circuit upheld a finding of nexus essentially because Mr. Brown's Marine superiors, who personally believed the off-duty conduct attributed to Mr. Brown to be objectionable, baldly claimed a loss of "trust and confidence."

There is no evidence of record that the conduct attributed to Mr. Brown prevented Mr. Brown from fulfilling his job responsibilities as MWR Program Manager. Nor is there any evidence of record that either the integrity of Mr. Brown's efforts as a Program Manager can be impugned, or that Marines and/or their family members (outside of the authority persons who testified for the agency before the MSPB) would be reluctant to attend any of the events coordinated by Mr. Brown because of the alleged affair. Allowing the federal employer to remove an employee for off-duty conduct because of claims of lost trust or confidence, colored by the distaste experienced by agency officials in response to that off-duty conduct, is tantamount to eliminating the nexus requirement in its entirety. After all, no employee is ever removed for disciplinary reasons in the absence of displeasure by the employee's superiors in regard to the subject conduct.

To the contrary, Section 7513 permits discipline for off-duty conduct "only" in those instances where discipline is for "such cause as will promote the efficiency of the service." The adverb "only" is rendered meaningless if mere displeasure of agency officials and/or the unsubstantiated and illogical speculations of future repercussions is substantial evidence justifying removal. Certiorari must be granted so that the proper limits on agency disciplinary authority may be addressed.

2. The Opinion and Order Below Are Wrongly Decided

Although the MSPB majority based a nexus finding in this case on separate theories of "mission impairment" and of a management loss of "trust or confidence" (App. 42a-43a), the Federal Circuit functionally upheld the MSPB decision on a "trust or confidence" basis stated in the guise of a "mission" theory. Thus, in the pivotal language of the Federal Circuit opinion, the court of appeals first stated that substantial evidence supports a nexus finding between the alleged conduct

and "both the mission of the agency in general and his job responsibilities in particular." App. 7a. However, in elaborating on the basis for the conclusion, the Federal Circuit asserted that "the *trust and confidence* of the Marine families and the Marine commanders served by MWR was essential to MWR's proper functioning and to Mr. Brown's performance of his duties within MWR" and that "the necessary *trust and confidence* was undermined by conduct of the sort at issue in this case." *Id.* (emphasis added). As will be explained *infra*, the only circumstances in which a "mission impairment" theory may justify a nexus conclusion are clearly inapposite to the present case, and the "trust and confidence" theory actually applied by the Federal Circuit for a nexus finding is an impermissibly open-ended invitation for agency officials to remove an employee for mere displeasure with the employee's off-duty activity.

For a nexus to be found based on "mission impairment" grounds, the off-duty conduct of the disciplined employee must be so closely connected to the employee's job responsibilities that the *integrity of any future job performance of that employee is impugned by the off-duty conduct that has occurred*! Ironically, the four court cases cited in the Federal Circuit's decision demonstrate that a nexus finding based on "mission impairment" is closely cropped and not intended to extend to purported losses of trust and confidence.

In *Giles*, *supra*, an Internal Revenue Service agent responsible for the collection of delinquent tax payments and returns was removed after he failed to timely file his own returns. 553 F.2d at 648. In upholding the removal, the court rhetorically asked "how must it appear to plaintiff's fellow workers, to revenue officials of the state, and to other members of the taxpaying public who know of it, that an agent of IRS evaded compliance with so elementary, but fundamental, a requirement of the income tax system." 553 F.2d at 650. Later, the court reiterated that "[m]embers of the public, who must

turn square corners in tax matters, demand no less of revenue officers." *Id., quoting from Birnholz v. United States*, 199 Ct. Cl. 532, 537 (1972).

Masino, supra, involved a customs inspector required to enforce laws against marijuana who was removed for his off-duty personal use and transportation of marijuana. 589 F.2d at 1049. The court noted (589 F.2d at 1056):

> Since possession and/or use of marijuana is a violation of federal criminal statutes, he was clearly not conducting himself in a manner to be expected of a Government employee engaged in law enforcement duties. . . . [T]he transportation and use of the very contraband which a law enforcement officer is sworn to interdict, is clearly misconduct which "speaks for itself."

In *Allred, supra*, an employee removed for the off-duty molestation of a child (786 F.2d at 1129) was responsible for the monitoring of health and social service programs for children. 786 F.2d at 1131. The Federal Circuit concluded that a nexus could be found on a "mission impairment" basis, and that proof of a direct effect on the employee's job performance was unnecessary only because the "misconduct was of a character likely to undermine *public* confidence in the agency." *Id.* (emphasis added). Thus, it was only because the public could legitimately question the integrity of services provided by the employee that a nexus finding in the absence of proof of an effect on job performance was justified in *Allred*.

Yet perhaps the most illustrative decision on the limitation of a nexus finding based on an "mission impairment" theory is found in the Seventh Circuit's decision in *Wild v. United States Department of Housing and Urban Development*, 692 F.2d 1129 (7th Cir. 1982). In particular, *Wild* explains the scope of the nexus requirement under Section 7513 in light of the "prohibited personnel practice" prohibition found in 5 U.S.C. 2302(b)(10). Under Section 2302(b)(10), a federal official with disciplinary authority over employees may not "discriminate . . .

against any employee . . . on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others." *Wild* concerned a housing appraiser with the Department of Housing and Urban Development (692 F.2d at 1130) who was also an off-duty "slumlord" (692 F.2d at 1133). The Seventh Circuit in *Wild* recognized that, in light of Section 2302(b)(10), the nexus requirement in Section 7513 disallows the taking of disciplinary actions against persons who are engaged in "deviant or unorthodox private behavior" unless it is a disciplinary action in "the interests of the agency." 692 F.2d at 1133. Removal of the employee in *Wild* was still proper under the nexus requirement because more was present; *i.e.*, "a HUD appraiser moonlighting as a 'slumlord.'" *Id.* It was this "behavior [which was] blatantly inconsistent with the mission of the employer." *Id. Wild* thus carefully draws the distinction between arguably distasteful off-duty activities of an employee (that are immune from the disciplinary authority of the federal employer) and the limited circumstances in which off-duty conduct may warrant discipline under the nexus requirement on a "mission impairment" theory.

Nexus was thus found in each of these cases because the integrity of any job performance by the employee could be impugned by the employee's off-duty activities. By contrast, Mr. Brown served as an area program manager for the MWR Department at a Marine base, and was thus responsible for the planning, development and coordination of social events for military personnel. App. 2a, 16a-17a. In other words, Mr. Brown was a "party and recreation event planner," and not a "counselor or therapist." App. 16a-17a. The point is that the integrity of any recreational and social events for Marines and their families planned and facilitated by Mr. Brown cannot be impugned merely by the events attributed to Mr. Brown in his private life. As such a finding cannot be made regarding the social event planning by Mr. Brown, the Federal Circuit erred in upholding a finding of nexus based on a premise of the conduct being contrary to the agency mission.

By upholding the removal decision based upon a management loss of "trust or confidence," the Federal Circuit has created a dangerous blueprint for unwarranted governmental inquiries into employees' private lives. The MSPB itself has stated that "the establishment of nexus . . . should not depend upon mere assertion or speculation." *Merritt v. Department of Justice*, 6 MSPB 493, 510, 6 M.S.P.R. 585, 606 (1981); *see also Bonet v. United States Postal Service*, 661 F.2d 1071, 1076 (5th Cir. 1981) (an "agency cannot satisfy the statutory requirement that an employee's removal promotes the efficiency of the service by use of unsupported, general assertions that such action is necessary to maintain the public confidence"); *D.E. v. Department of the Navy*, 721 F.2d 1165, 1169 (9th Cir. 1983) (statements by employee's superiors to the effect that the superiors lost confidence in the employee found to be inadequate evidence of nexus). Yet all of the evidence presented by the agency below to "justify" a nexus finding based on a purported loss of trust and confidence was premised on the speculative predictions of how persons would react to Mr. Brown's presence if he remained on the job. *See* App. 4a-7a, 17a-18a (describing agency testimony before MSPB on purported loss of trust or confidence by agency with liberal assertions of what "would" happen). Speculations by agency officials of how Mr. Brown's future presence will be perceived is not substantial evidence of nexus.

What *may* have justified a nexus finding, on this record, due to a purported loss of trust and confidence was, as noted in Judge Linn's dissenting opinion, completely absent in this case. A nexus finding must be based on a connection between the off-duty conduct and "the employee's job-related responsibilities." *Allred, supra*, 786 F.2d at 1130. Yet, as noted in the dissenting opinion below (and not contradicted by the majority opinion), no agency witness on the nexus question testified as to any impairment of future job performance by Mr. Brown because of his off-duty conduct. App. 10a-11a, 15a. Nor was there any evidence from Marines and/or their family members

outside of authority positions that they would be reluctant to use Mr. Brown's services because of the off-duty conduct that is attributed to Mr. Brown. App. 10a, 18a-19a, 32a.

The misapplication of the "loss of trust or confidence" theory of nexus in this case is, however, indicative of what is the *true* reason for the agency's removal of Mr. Brown from his civilian position. Mr. Brown was removed simply because agency officials personally disapproved of Mr. Brown's purported conduct. As the dissenting opinion cogently stated (App. 18a):

> Brown's superiors, including his immediate boss and two Marine colonels, essentially testified that they disapproved of Brown's behavior. If this evidence is enough to warrant removal, then no employee is safe from the threat of removal.

Similarly, the Federal Circuit's continued suggestion that the decision to remove Mr. Brown is justified by the "mores" of the "Marine community" (App. 11a, 13a) is indicative of the fact that nexus was ultimately found based on the personal perspectives of Mr. Brown's Marine superiors. However, personal disagreement with how a *civilian* employee chooses to conduct his off-duty affairs is not a proper basis for a nexus finding. Judge Linn's dissenting opinion is correct in its suggestion that removal cannot be sanctioned "because of a difference in values between that employee and his superiors." App. 18a. Or, as stated in MSPB Vice Chair Slavet's dissenting opinion below, "[Mr. Brown] in his civilian capacity is not a Marine and accordingly, is not subject to Marine Corps standards." App. 32a.

Despite the specialized jurisdiction of the Federal Circuit, this Court has previously found it appropriate to review Federal Circuit decisions because of the importance of the underlying question of federal law.[1] *E.g.*, *Gregory v. United States Postal*

---

[1] Except where issues of unlawful discrimination under one or more specified statutes are also present, the Federal Circuit has exclusive jurisdiction to review MSPB decisions. 5 U.S.C. 7703(b)(1) and (2).

Service, 212 F.3d 1296 (Fed. Cir. 2000), *cert. granted sub. nom., United States Postal Service v. Gregory*, No. 00-758 (U.S. Feb. 20, 2001). This case presents an important question of federal law appropriate for this Court's review. Section 7513(a) authorizes removals of civilian employees "only" for such cause as will promote the efficiency of the service. If employees could be removed simply because of the personal displeasure of superiors toward the lawful off-duty activities of civilian employees, there would be functionally no limitation on federal employment discipline since the raison d'etre of any employment discipline is the employer's displeasure with the subject conduct. To the contrary, lawful and private off-duty conduct by any civilian employee that does not impair the agency's operations *is simply none of the employer's business*!

There is no evidence that Mr. Brown's present or future job performance is hampered because of the purported off-duty conduct. Mr. Brown's removal cannot be based on speculative assertions of a loss of trust or confidence, and the Federal Circuit's labeling of a purported loss of trust or confidence under a "mission interference" theory is a misapplication of the nexus requirement. The Federal Circuit's decision is clearly erroneous, and certiorari should be granted.

B. The Federal Circuit's Application of the Nexus Requirement Conflicts With the Standards Established By Other Federal Appellate Courts For The Application Of The Nexus Requirement

A further basis for this Court's granting of the present petition for certiorari may be seen in the conflict between the application of the nexus requirement by the Federal Circuit in this case and the standards established for the application of the nexus requirement by other federal appellate courts. In the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Sec. 144, 96 Stat. 25, 45 (1982), the provision governing judicial review of MSPB decisions, 5 U.S.C. 7703(b), was amended to provide that the Federal Circuit is the exclusive

forum to review MSPB decisions except where, per 5 U.S.C. 7703(b)(2), the case involves claims of unlawful discrimination under any of a number of civil rights statutes. Thus, a majority of MSPB decisions subjected to judicial review are presently decided by the Federal Circuit. However, other circuits still currently address MSPB decisions on issues of federal employment law in the course of also resolving claims of unlawful discrimination. *See e.g., Williams v. Department of the Army*, 715 F.2d 1485, 1489-91 (Fed. Cir. 1983) (*en banc*); *Barnes v. Small*, 840 F.2d 972, 979 (D.C.Cir. 1988); *Morales v. MSPB*, 932 F.2d 800, 801-02 (9th Cir. 1991) (all indicating that, per 5 U.S.C. 7703(b)(2), a district court has jurisdiction to review nondiscrimination issues decided by the MSPB where discrimination issues are also present).

The existence of statutory language forbidding the federal employer from removing civilian employees except for "such cause as will promote the efficiency of the service" long predates the statute placing primary judicial review authority over MSPB decisions with the Federal Circuit.[2] As a result, federal appellate courts other than the Federal Circuit have addressed the nexus requirement currently found in Section 7513, and these other appellate courts may again address the nexus requirement in the future. The standards applied by other federal appellate courts for the nexus requirement are directly contradicted by the Federal Circuit's decision in this case. The conflict between the present Federal Circuit decision and the application of the nexus requirement by other federal appellate courts is an additional basis for the granting of certiorari.

The Federal Circuit's decision in the present case upheld a nexus finding on the basis of the bald assertions by agency officials that *they* have lost trust and confidence in Mr. Brown's

---

[2] The statutory language limiting an employing agency's removal authority to "such cause as will promote the efficiency of the service" has its origins in the Lloyd-La Follette Act of 1912. *Arnett v. Kennedy*, 416 U.S. 134, 150 (1974) (Rehnquist, J., plurality opinion).

job performance because of his alleged conduct. Yet the type of testimony on officials' trust and confidence found sufficient for nexus purposes by the Federal Circuit has been found to be inadequate by both the Fifth and Ninth Circuits. *See Bonet, supra*, 661 F.2d at 1076 (Fifth Circuit holding that an "agency cannot satisfy the statutory requirement that an employee's removal promotes the efficiency of the service by use of unsupported, general assertions that such action is necessary to maintain the public confidence"); *D.E., supra*, 721 F.2d at 1169 (Ninth Circuit holding that statements by employee's superiors to the effect that the superiors lost confidence in the employee found to be inadequate evidence of nexus). More generally, numerous federal appellate courts other than the Federal Circuit have read the nexus requirement to require the overturning of agency removal decisions where no evidence of an adverse impact on job performance is shown as a result of an employee's off-duty conduct. *E.g., Gloster, supra*, 720 F.2d at 704 (D.C. Circuit overturned agency decision to remove custodial employee for welfare fraud where no relation shown between off-duty conduct and job performance); *D.E., supra*, 721 F.2d at 1169 (Ninth Circuit overturned removal of diesel engine mechanic for child molestation where "not a scintilla of evidence" was presented showing that the off-duty conduct affected the employee's work); *Phillips v. Bergland*, 586 F.2d 1007 (4th Cir. 1978) (Fourth Circuit overturned removal of employee for off-duty altercation with co-worker due to absence of a showing of impact on employee's job); *Young v. Hampton*, 568 F.2d 1253, 1258 (7th Cir. 1977) (removal of Department of the Army employee for off-duty possession of marijuana and other illegal drugs overturned by Seventh Circuit in the absence of evidence of adverse effect on the efficiency of the service).[3]

---

[3] *See also DeLeonardis v. Weiseman*, 986 F.2d 725, 727 n. 9 (5th Cir), *cert. den.*, 510 U.S. 817 (1993) (Fifth Circuit observation that the Office of Special Counsel misapplied the nexus principles embodied in 5 U.S.C. 2302(b)(10) by investigating an employee's off-duty lifestyle and activities).

Collectively, the appellate court decisions just described recognize the basic principle that, regardless of the nature of the employee's off-duty conduct, a nexus to the employee's job performance must be shown for the federal employer to cite that off-duty conduct in a disciplinary setting. As the Fourth Circuit stated in *Phillips*, *supra*, "the mere fact that the employee has committed an immoral or disgraceful act- even a criminal act- will not justify a discharge." 586 F.2d a 1011. Similarly, the Seventh Circuit in *Wild*, *supra*, in explaining the scope of the nexus requirement in light of the Section 2302(b)(10) prohibition on discipline for conduct which does not affect the employee's performance or the performance of others, distinguished those off-duty actions actionable under the nexus requirement from "deviant or unorthodox private behavior" which does not, standing alone, warrant federal employer discipline. 692 F.2d at 1133.

In contrast to the principles developed in these other appellate courts, the Federal Circuit upheld Mr. Brown's removal based on expressions of a loss of management trust and confidence unaccompanied by any evidence of an adverse impact on either the job performance of Mr. Brown or the job performance of others. Distilled to their essence, the claims of lost "trust and confidence" are nothing more than the expressions of personal displeasure by management officials. Under the decisions of federal appellate courts other than the Federal Circuit, such evidence would be deemed insufficient to meet the nexus requirement. The Federal Circuit's application of the nexus requirement in a manner conflicting with the decisions of other federal appellate courts is an additional basis for the granting of certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK D. ROTH
General Counsel
CHARLES A. HOBBIE
Deputy General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
(202) 639-6424

KEVIN M. GRILE *
Assistant General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
449 North Clark Street, Ste. 300
Chicago, Illinois 60610
(312) 645-1803

* *Counsel of Record*

March 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

00-3003

MICHAEL J. BROWN,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

DECIDED: October 20, 2000

Before SCHALL, BRYSON, and LINN, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* BRYSON.

Dissenting opinion filed by *Circuit Judge* LINN.

BRYSON, *Circuit Judge.*

Based on a charge of improper personal conduct, Michael J. Brown was removed from his civilian position with the Marine Corps. Mr. Brown appealed his removal to the Merit Systems Protection Board, which upheld the action. Before this court, Mr. Brown contends that the Corps failed to establish a sufficient nexus between the charged off-duty misconduct and the efficiency of the service, and that the penalty of removal was unjustified. We affirm.

I

In 1995, after leaving active duty as a Marine Corps officer, Mr. Brown joined the reserves and secured a civilian position with the Marine Corps at Camp Lejeune, North Carolina. He served as area program manager for the Morale, Welfare, and Recreation Department (MWR) at the base.

MWR programs provide service members and their families with a variety of services including athletic, recreation, and entertainment activities. An area program manager plans, develops, and coordinates MWR activities for the military personnel assigned to the area.

In 1997, Mr. Brown was removed from his position based on the charge that he had engaged in "improper personal conduct having an adverse effect on the efficiency of the service." Specifically, the removal notice charged that Mr. Brown had engaged in an adulterous relationship with the wife of a Marine major assigned to a unit supported by Mr. Brown while the major was deployed overseas.

Following his removal, Mr. Brown appealed to the Merit Systems Protection Board. An administrative judge conducted a hearing and sustained the removal action. The administrative judge found that the affair had occurred as alleged and that the Corps had established a sufficient nexus between Mr. Brown's misconduct and the efficiency of the service. In particular, the administrative judge found that Mr. Brown's misconduct was antithetical to MWR's mission and that it had adversely affected the Corps' trust and confidence in Mr. Brown's job performance. The administrative judge also concluded that the removal penalty was within the limits of reasonableness.

Mr. Brown petitioned the Board for review of the initial decision. The Board denied the petition over a dissent from Vice Chair Slavet, who stated that in her view the Corps had not sustained its burden of showing by a preponderance of evidence that there was a nexus between Mr. Brown's misconduct and the efficiency of the service.

II

An agency may remove an employee "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). To satisfy that requirement, the agency must show

by preponderant evidence that there is a nexus between the misconduct and the work of the agency, *i.e.* that the employee's misconduct is likely to have an adverse impact on the agency's performance of its functions. *See, e.g., Mings v. Dep't of Justice*, 813 F.2d 384, 389-90 (Fed. Cir. 1987).

A

Because the underlying historical facts relating to Mr. Brown's misconduct are uncontested on appeal, Mr. Brown contends that we should review *de novo* the Board's decision that the Corps has established a nexus between his conduct and the efficiency of the service. In fact, however, the statutory standard that governs our review of decisions of the Merit Systems Protection Board, 5 U.S.C. § 7703(c), requires that we apply deferential review to determinations by the Board as to whether such a nexus has been shown. *See Hayes v. Dep't of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984) ("It is not our duty to find nexus but rather to decide, under our statutory scope of review in 5 U.S.C. § 7703(c), whether the MSPB affirmance of the agency conclusion on the nexus issue meets the statutory criteria for our affirmance."); *see also White v. United States Postal Serv.*, 768 F.2d 334, 336 (Fed. Cir. 1985) ("A determination of nexus, one factor in a removal decision, must be affirmed on appeal if supported by substantial evidence."). Absent a mistake of law by the Board in selecting the proper test for analyzing the nexus requirement, which is not present here, we must uphold the Board's nexus finding if it is supported by substantial evidence.

B

Mr. Brown asserts that the evidence was insufficient to show that his misconduct adversely affected either MWR's mission or his ability to perform his job. With respect to the relationship between his misconduct and the department's mission, Mr. Brown argues that his job involved planning and facilitating recreation and entertainment, not "assisting

Marines and their spouses on personal or family-related problems," and that his misconduct was irrelevant to the task of providing recreation and entertainment to Marine families.

Based on evidence adduced at an evidentiary hearing, the administrative judge found that "the purpose of [Mr. Brown's] position, and the MWR Department, was to provide support for the Marines, and the families of those Marines while they are deployed," that Mr. Brown's adulterous affair involved the wife of a Marine officer assigned to one of the units that Mr. Brown was charged with supporting, and that the affair occurred during a period that the officer was deployed overseas. Those findings provided the basis for the administrative judge's conclusion that Mr. Brown's misconduct "was antithetical to the agency's very mission," *i.e.*, that there was a sufficient nexus between Mr. Brown's misconduct and the mission of the MWR department where he worked. As the administrative judge put it, the Corps "should not have to retain an employee who instead of assisting its deployed Marines, as is the purpose of the MWR and the Program Manager position, has an adulterous affair with the wife of one of those very Marine officers."

The administrative judge's findings regarding the mission of the MWR department and Mr. Brown's responsibilities as program manager were supported by the mission statement of MWR and testimony from several persons familiar with the program. The mission statement, taken from the MWR Policy Manual, stated that MWR was responsible, in part, for providing military families with "well-rounded, wholesome athletic, recreation leisure time activities to ensure their mental, physical, and social well-being; and for providing dining, beverage and entertainment services." An MWR operations officer testified that the program manager was responsible for supporting deployed Marines' families in a variety of ways, including arranging recreation and entertainment events, assisting with events sponsored by

Marine spouse volunteers, and attending meetings with various groups. A commander's wife, who coordinated a volunteer family-support program staffed by the spouses of Marines, testified that one of the responsibilities of the MWR program manager was to support her program, which involved substantial contact with Marine spouses.

The administrative judge's findings that Mr. Brown's misconduct adversely affected MWR's ability to perform its mission and undermined management's trust and confidence in his job performance were based on evidence provided by five witnesses who testified at the hearing. The MWR operations officer testified that Mr. Brown's misconduct had undermined the credibility of MWR among the units it was assigned to support, which was "very damaging to MWR and to the job [Mr. Brown] was hired to do." The base volunteer coordinator testified that she and other Marine spouse volunteers worked with the MWR program manager, that the purpose of her volunteer program was "to promote a healthy community" among the Marine families, and that conduct such as Mr. Brown's would threaten her program by "put[ting] it in a less than favorable light."

The Assistant Chief of Staff of the MWR division testified that program managers have regular contact with the wives of deployed marines in their capacity as volunteer workers, and that it was important for deploying Marines to be confident that their families would be well cared for while they were away, a task that was partly the responsibility of MWR program managers. To ignore conduct such as Mr. Brown's, he testified, would undercut the integrity of the organization. He further testified that a commander who learned of Mr. Brown's misconduct would likely come to him and request that Mr. Brown not associate with his personnel in the future, and that he did not think "any commander would allow [him] . . . to put Mr. Brown back down into one of the program manager positions." When asked about the effect of Mr.

Brown's conduct on his efficiency in his position, he explained that Mr. Brown would "not be efficient at all. There will practically be no job because I don't believe people will turn to him for the support they would have turned to him [for] had . . . this thing not happened." The family readiness officer for one of the Marine Expeditionary Units (MEUs) stationed at the base testified that it was important for deployed marines to trust the MWR program managers, because "from their point of view, if they're out there, they should think that people back here, particularly males working with their spouses or involved in activities with their spouses are being professional." And a commander of one of the MEUs at the base testified that if commanders bypassed the MWR program manager, it would degrade the efficiency of the MWR operation.

In his own testimony, Mr. Brown stated that he circulated among his patrons in order to provide "quality customer service," a function that would be jeopardized if many patrons did not want to interact with him, and that he served "all kinds of patrons" including individual Marines, commanders, retirees, volunteers, and family members. He also admitted that he spent a significant portion of his time meeting with volunteers, and that he had attended some of the functions he planned. Mr. Brown also acknowledged that the units in his area of responsibility were not required to use his services.

The witnesses emphasized the special circumstances that made Mr. Brown's misconduct especially troubling in light of the role of MWR in general and the program manager's position in particular. The MWR operations officer testified that the critical factor in this case, in his view, was that the woman with whom Mr. Brown became involved was married to a Marine in one of the units that Mr. Brown was charged with supporting. He testified that the program manager was responsible for supporting the Marine families when the

Marines were deployed, and that a commander of the deployed units has "to know that he can trust the people who are back here with these families. His marines and sailors can't do their jobs very well if they know there's someone not very trustworthy back there." He further explained that Mr. Brown's job was to make sure that "the dependents of the members who were deployed were taken care of. And that didn't happen." The case would have been quite different, he testified, if Mr. Brown had not held a position of trust or if he had had his affair with someone who was not the wife of a Marine in one of the units he was charged with supporting.

We hold that substantial evidence supports the administrative judge's finding of a nexus between Mr. Brown's misconduct and both the mission of his agency in general and his job responsibilities in particular. To be sure, this case is a difficult one because the misconduct was private in nature and did not affect Mr. Brown's official responsibilities in any direct and obvious way. In many settings, such conduct would not be sufficient to justify removal from a civil service position. As the administrative judge found, however, Mr. Brown's position was not an ordinary one. He held a managerial position in an office that was responsible for providing support to Marine families, including the families of Marines who were deployed overseas. The evidence supported the administrative judge's conclusion that, in light of MWR's responsibilities to the Marine families it served, the trust and confidence of the Marine families and the Marine commanders served by MWR was essential to MWR's proper functioning and to Mr. Brown's performance of his duties within MWR. The evidence further supported the administrative judge's finding that the necessary trust and confidence was undermined by conduct of the sort at issue in this case—initiating an adulterous affair with the wife of a deployed Marine who was a member of a unit that Mr. Brown was directly responsible for supporting. Based on the particular context in which this

case arose and the evidence presented to the administrative judge, we cannot agree with Mr. Brown that the administrative judge's nexus finding is unsupported by substantial evidence.

In other settings, off-duty misconduct has been held sufficient to justify an employee's removal where that misconduct was found to be inconsistent with the mission of the employing agency. For example, in *Allred v. Department of Health & Human Services*, 786 F.2d 1128 (Fed. Cir. 1986), this court upheld the removal of an HHS accountant who was convicted of child molestation. The court noted that the mission of HHS is to administer health and social services to various classes of disadvantaged persons, including children, and the agency offered evidence that the victim of Mr. Allred's offense was the kind of person the agency was attempting to help. In that context where the agency presented evidence that the misconduct was contrary to the agency's mission and that Mr. Allred's supervisors had lost confidence in him, the court held that the agency's evidence was sufficient to justify removal. *See* 786 F.2d at 1131. In another case, *Giles v. United States*, 553 F.2d 647, 650 (Ct. Cl. 1977), our predecessor court held that the Internal Revenue Service could fire a revenue officer for failing to file timely federal and state income tax returns. Testimony that such conduct "would have a deleterious effect upon the morale of other IRS personnel and upon the respect which other Government agencies and the public had for IRS," was sufficient, the court explained, to support the employee's removal. 553 F.2d at 650. Similarly, the private use of marijuana was held sufficient to justify the removal of a Customs Inspector, based on the mission of the Customs Service, which is in part to interdict the importation of illegal drugs. *See Masino v. United States*, 589 F.2d 1048, 1056 (Ct. Cl. 1978). And an employee of the Department of Housing and Urban Development was held to have been validly removed based on his ownership of deteriorated rental properties on the

ground that his conduct undermined public confidence in the agency. *See Wild v. United States Dep't of Housing & Urban Dev.*, 692 F.2d 1129, 1132-34 (7th Cir. 1982). Although Mr. Brown's case is distinguishable on its facts from each of the cited cases, the principle applied in each is the same: off-duty conduct that is inconsistent with the agency's mission and that undermines confidence in the employee can be sufficient to justify the employee's removal.

C

Mr. Brown makes a number of arguments about why the evidence of nexus in this case was insufficient. None of the arguments, however, persuades us that the Board's finding of nexus must be overturned.

First, Mr. Brown argues that he had known the woman with whom he had the affair since before becoming the program manager of MWR. Thus, he contends, he did not use his position in MWR to enter into an adulterous affair with a Marine wife. Nonetheless, the affair occurred while Mr. Brown was serving as the MWR program manager and while the woman's husband—a member of a unit Mr. Brown served—was deployed overseas. To be sure, the case for nexus would have been stronger if Mr. Brown had directly used his position to obtain access to a Marine wife with whom he then started an affair. But the fact that the relationship did not develop as a direct result of Mr. Brown's activities as program manager of MWR does not affect the loss of confidence and trust in him as a person responsible for the morale and welfare of Marine families, nor does it eliminate the concern over the inconsistency between his conduct and the mission of his agency.

Mr. Brown makes the related argument that in light of the unusual circumstances surrounding his affair, he is no more likely than anyone else to have an affair in the future with the spouse of a Marine he is charged with supporting. But there is

no requirement that the agency prove that particular misconduct is likely to recur. *See Yacovone v. Bolger*, 645 F.2d 1028, 1033 (D.C. Cir. 1981). In any event, the evidence established that Mr. Brown's misconduct violated the mores of the Marine community, and it is not irrational to conclude from that fact alone that those mores have less coercive power over him than over others. In light of the fact that Mr. Brown's position involved more than minimal contact with Marine spouses, it would not be unreasonable to conclude that Mr. Brown posed a greater-than-average risk of future, job-related misconduct, and that such misconduct could again cause problems for MWR.

Second, Mr. Brown points out that the Corps failed to elicit specific testimony from Mr. Brown's patrons that they would no longer use his services. Nonetheless, we cannot say that the administrative judge's finding to that effect was unsupported by substantial evidence. The deciding official, who oversaw MWR, testified about his prior experience as a unit commander. His testimony that unit commanders would not want their units dealing with Mr. Brown, which was unrebutted by any evidence or cross-examination from Mr. Brown, reasonably supported the administrative judge's finding. In addition, the MEU commander testified that conduct such as Mr. Brown's would leave a "bad taste in everyone's mouth," and that a commander could bypass the services of a program manager, which would degrade efficiency. The commander's testimony was not inconsistent with that of the deciding official, which was sufficient on the issue.

Third, Mr. Brown argues that his job performance was not affected by his off-duty misconduct. Management, however, was concerned not about a deterioration in Mr. Brown's actual performance, but about a loss of confidence in MWR and in Mr. Brown due to his patrons' knowledge of the affair. As this court explained in the *Allred* case, "where an

employee's conduct is contrary to the agency's mission, the agency need not present proof of a direct effect on the employee's job performance." 786 F.2d at 1131.

Finally, Mr. Brown complains that he was held to a military, rather than civilian, standard of conduct. In support, he cites the testimony of the deciding official, who stated that "civilian employee[s], in my estimation, are expected to uphold really the same standards because they are people standards, they're human standards."

Contrary to Mr. Brown's suggestion, the mores of the group he served are not irrelevant to his job performance and the expectations fairly placed upon him. Conduct that might be overlooked in some settings can be the cause for removal in other settings in which the conduct is perceived as more clearly inappropriate or contrary to the mission of the employing agency, such as in the *Allred, Masino, Giles*, and *Wild* cases cited earlier. In each of those cases, removal was based in large part on the nature of the particular agency involved; conduct that justified removal in those contexts might not have justified removal in ordinary settings. Mr. Brown's job responsibilities were to serve the Marine community, and his effectiveness depended at least to some extent on his compliance with certain basic standards of conduct shared by that community. Moreover, he chose to serve the Marine community, and because of his long membership in and association with that community, he was well aware of the standards of that community. Because his job was to serve the Marine community, it is not a sufficient answer for him simply to say that he was a civilian employee and therefore the standards of conduct of the Marine community had no applicability to him.

In various of the arguments he makes, Mr. Brown relies on the dissenting opinion of Board Vice-Chair Slavet. While we acknowledge that there is force to many of the points made in Vice-Chair Slavet's opinion, it is important to note that our

posture in reviewing the Board's decision is quite different from that of the Board in making it. The task of the Board is to decide whether the agency met the burden of proving a nexus by a preponderance of the evidence. *See* 5 U.S.C. § 7701 (c)(1)(B). Our task, by contrast, is to determine whether the Board's finding is supported by substantial evidence, which is a considerably less exacting standard. *See e.g. Schnakenberg v. United States*, 219 Ct. Cl. 697, 698 n.1 (1979) ("substantial evidence can support either of two contrary findings, but only one finding can have a preponderance"). Regardless of whether we would have resolved this case as the Board did if we had sat as the finders of fact, we are unable to say that substantial evidence does not support the finding made by the Board.

III

Mr. Brown contends that even if the government proved a sufficient nexus in this case, the penalty of removal was unjustified. In upholding the penalty, the administrative judge noted that the deciding official had considered the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). The administrative judge concluded that the deciding official had considered the appropriate factors and had not reached an unreasonable conclusion as to the choice of penalty in light of those factors.

Mr. Brown's principal contention in challenging the penalty is that he never received notice that his civilian employment could be affected by an adulterous affair with a Marine spouse. In that regard, the deciding official found that Mr. Brown's status as a major in the reserves provided sufficient notice; Mr. Brown thinks that status was insufficient to warn him of the consequences for his civilian job.

The lack of formal notice concerning the adverse effects of an adulterous affair with the spouse of a Marine does not rise

to the level of a significant mitigating factor that MWR and the Board failed to consider. Mr. Brown's military background and position within a military community should have put him on notice that the affair could cause serious problems within the community. As this court noted in *Brown v. Department of Transportation*, 735 F.2d 543, 548 (Fed. Cir. 1984), even if MWR did not provide an express warning to Mr. Brown regarding the consequences of an adulterous affair with a Marine spouse, his "common sense should have forewarned him."

The same analysis pertains to Mr. Brown's related contention that the penalty of removal was inappropriate because of the "unique" or "exceptional" nature of this case. Cases involving off-duty misconduct often involve unusual facts that arise in a specific context, and the particular circumstances and context are often sufficiently distinctive that there are no closely analogous cases in which similar action has been taken. The fact that there may be no direct precedent for the action taken in a particular case does not, however, prohibit the agency from taking adverse action if it is consistent with general principles of federal employment law. We are satisfied that the agency's action in this case did not depart from those principles so as to render the penalty invalid.

In reviewing the propriety of a penalty, this court necessarily accords considerable discretion to the agency. We will not overturn a "penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all the factors." *Mings*, 813 F.2d at 390. Given the totality of the circumstances of this case, Mr. Brown has not persuaded us that his removal was totally unwarranted, and we therefore uphold the agency's action.

Each party shall bear its own costs for this appeal.

AFFIRMED.

LINN, *Circuit Judge*, dissenting.

I respectfully dissent from the majority opinion because there is no showing that Brown's private consensual conduct, improper though it was, had an adverse impact on the efficiency of the service. The Board, and the majority opinion, has stretched the nexus requirement so thin that Brown has become subject to the moral judgments of his employer. As one of our sister circuits has repeatedly pointed out, that is an improper role for the government. *See Norton v. Macy*, 417 F.2d 1161, 1165 (D.C. Cir. 1969) ("[T]he notion that it could be an appropriate function for the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity."); *Doe v. Hampton*, 566 F.2d 265, 273 n.20 (D.C. Cir. 1977) ("The nexus requirement . . . serves to minimize unjustified governmental intrusions into the private activities of federal employees."); *Gloster v. General Servs. Admin.*, 720 F.2d 700, 703 (D.C. Cir. 1983) ("The nexus requirement is particularly strict in cases involving non-work-related misconduct.").

BACKGROUND

Preliminarily, I wish to clarify two points in the majority's presentation of the factual background of this case. First, in my view the misconduct in this case has not been clearly framed. Brown's relationship with a married woman predated his position at Camp Lejeune and had no causal connection with his job. He was a neighbor of the woman and met her before he started working at Camp Lejeune. There was no evidence in the record that his contacts with the woman occurred at, were facilitated in any way by, or were related to any events or activities sponsored by the MWR Department. Even Colonel Stewart, the official who removed Brown,

stated that there was no allegation that Brown used his position to further his misconduct.

Second, the impact of Brown's misconduct on his job has not been clearly framed. The record reveals no evidence at all of any negative impact. The record indicates that Brown received the highest possible performance appraisal, and a Certificate of Commendation, for the period covering virtually the entire duration of his misconduct. Even Colonel Helland, testifying against Brown at the Board's evidentiary hearing, could not criticize Brown's support of the Colonel's unit. Colonel Helland stated that Brown's performance was adequate and that the Colonel had no complaints.

With that framework in mind, I now address the Board's finding, which the majority affirms, that Brown's misconduct somehow had adversely affected the efficiency of the service. As all parties recognize, an employee can only be removed "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a) (1994); *Crofoot v. United States Gov't Printing Office*, 761 F.2d 661, 664 (Fed. Cir. 1985); *see also Pararas-Carayannis v. Department of Commerce*, 9 F.3d 955, 957 (Fed. Cir. 1993). "This requires that there be a nexus between the employee's misconduct and the efficiency of the service." *Sanders v. United States Postal Serv.*, 801 F.2d 1328, 1332 (Fed. Cir. 1986); *see also Pararas-Carayannis*, 9 F.3d at 957. The Board summarized the ways in which such a nexus can be shown as consisting of: (1) existing egregious circumstances that give rise to a rebuttable presumption of nexus based on the nature and gravity of the misconduct; (2) preponderant evidence showing that the misconduct affects the employee's or his co-worker's job performance; (3) preponderant evidence showing that the misconduct affects management's trust and confidence in the employee's job performance; and (4) preponderant evidence showing that the misconduct interfered with or adversely affected the agency's mission. *See Brown v. Department of the Navy*, No. DC-

0752-97-1018-I-1, slip op. at 7 (MSPB Jan. 2, 1998) (the AJ's opinion) (*"Board Opinion"*). The Board did not find that Brown's misconduct had affected his job performance. The Board relied only on the last two of these four possible avenues to a nexus, and I address below the lack of substantial evidence to support each.

ANALYSIS

1. Trust and Confidence

The AJ found that "the agency has . . . proven nexus by showing by preponderant evidence that [Brown's] misconduct affected management's trust and confidence in his job performance." *Board Opinion*, slip op. at 11. As the AJ correctly pointed out, and our own case law requires, management's loss of trust and confidence must be directly related to the employee's job performance. See *Pararas-Carayannis*, 9 F.3d at 956-58 (Employee used both government time and money to launder prostitution proceeds.); *Sanders*, 801 F.2d at 1330 (Employee used agency premises and on-duty time, on two occasions, to engage in the sale of cocaine.); *Brown v. Department of Transp.*, 735 F.2d 543, 545, 548 (Fed. Cir. 1984) (Air traffic controller supervisor spoke at an off-duty rally of striking air traffic controllers, thus implicating his own loyalty to management.).

However, all of the evidence adduced at the Board's hearing was conjectural, speculative, or unrelated to Brown's actual job responsibilities. Bear in mind that Brown's principal role was to organize activities for Marines in the units he supported; Brown did not occupy a position, such as a counselor or therapist, that would require that the Marines he supported repose confidence and trust in him. Colonel Helland, the commanding officer of an expeditionary marine unit, stated that Brown's job was to be a "facilitator," making it easier to obtain resources and facilities, and Mr. Mayberry,

a family readiness officer, described Brown's job as "a party and recreation event planner."

Representative of this evidence is the testimony of Colonel Stewart, Assistant Chief of Staff of the MWR Department, commonly known as the head of the MWR. Colonel Stewart speculated in his testimony, emphasis added, that Brown "will not be efficient at all" and that he did not "believe that people will turn to him for [] support." But Colonel Stewart did not connect this perceived blackballing of Brown by others to Brown's actual job responsibilities of planning events. Mr. Blare, Director of the Operations Division of the MWR Department and Operations Officer of the MWR Department, also testified in a conclusory fashion. He stated that anything short of removal would not solve the problem, but failed to identify what aspect of Brown's job performance was in question. Mrs. Leferbre, a key volunteer coordinator and the wife of a commanding officer, stated that the wives of deployed Marines may be vulnerable. She also expressed her opinion that Brown's indiscretion would threaten the reputation of her program, the key volunteer program. However, she did not provide any evidence that Brown's job performance had been impaired or how it would be impaired because of his indiscretion. Colonel Helland testified to the generality that family problems can have considerable impact on a unit's perspective, but failed to provide any evidence that Brown's job performance had been compromised or might be impaired because of his particular misconduct. Mr. Mayberry opined generally that the Marines Brown served needed to be able to trust Brown, but Mr. Mayberry offered no evidence that any Marines had lost trust or that Brown's actual job performance would be impaired because of Brown's indiscretion. The testimony identified by the majority opinion fares no better. *See ante*, at 6 (majority opinion) (repeatedly using the conditional "would"). In my opinion, there is not substantial evidence of record showing

that management's loss of confidence is related to Brown's actual job performance.

Rather than requiring a connection to an employee's job performance, the majority opinion risks being viewed as sanctioning the removal of an employee simply because of a difference in values between that employee and his superiors. Colonel Stewart testified to this effect: "I can't imagine a marine commander wanting to deal with somebody who has . . . a track record of this kind of thing." Brown's superiors, including his immediate boss and two Marine Colonels, essentially testified that they disapproved of Brown's behavior. If this evidence is enough to warrant removal, then no employee is safe from the threat of removal. Mr. Blare testified that it would have been different if Brown had held some other position, specifically, a janitor, in the MWR Department. However, Mr. Blare fails to provide any connection between Brown's personal indiscretion and his actual job performance, without which a charge of loss of trust and confidence in that performance rings hollow. Again, the only evidence of Brown's performance is positive.

The situation might be different if the record contained testimony from those Marines and their families who were not in a position of authority over Brown and whom Brown was charged with supporting. *See Brown v. Department of the Navy*, No. DC0752-97-101 8-1-1 , slip op. at 7 (MSPB Aug. 10, 1999) (Slavet, Vice Chair, dissenting) (raising the same issue). The AJ recognized the utility of such evidence, asserting that Brown had "lost his credibility, integrity and ability to function with [the Marines and their families] as a result of his misconduct, and that this directly interfered with his ability to accomplish his assigned mission." *Board Opinion*, slip op. at 9. However, this finding is totally unsupported by any testimony from those "Marines and their families." The Board and the majority opinions include only testimony, such as that discussed above, that is premised on

the surmised disapproval of the Marines, or the families of the Marines, in the units supported by Brown.

Testimony from these supposedly disapproving individuals would have served to establish the necessary connection with Brown's job performance. These individuals might have testified that they no longer felt comfortable attending the functions that Brown organized or having Brown attend those functions as part of his assigned duties. The deployed Marines might have testified that they no longer felt comfortable having their families attend those functions while they were deployed. Key volunteers that were also the wives of Marines that Brown was charged with supporting might have testified that they no longer felt comfortable working with Brown in organizing events. Such testimony could have demonstrated that Brown's job performance and effectiveness would indeed have been impaired, in that he would have been unable to attend the events he planned, to get others to attend them, or even to plan them in the first place. Many possibilities were open to the Government to establish a connection between Brown's personal conduct and his actual job responsibilities and performance, but the Government did not avail itself of them.

Such testimony would also have served as a hedge against an abuse of power by Brown's superiors. Before the Government "enforce[s] [its] conventional codes of conduct in the private lives of its employees," *Norton*, 417 F.2d at 1165, it has the responsibility to establish "the necessary connection between the employee's off duty misconduct and the employee's job-related responsibilities," *White v. United States Postal Serv.*, 768 F.2d 334, 336 (Fed. Cir. 1985).

2. Agency Mission

The AJ also found "that the agency has proven nexus . . . by showing by a preponderance of the evidence . . . that [Brown's] misconduct . . . interfered with and adversely

affected the agency's mission." *Board Opinion*, slip op. at 8. As this court has recognized, such a finding provides a nexus without a direct showing of an impact on the employee's job performance. *Allred v. Department of Health and Human Servs.*, 786 F.2d 1128, 1131 (Fed. Cir. 1986) ("Courts have repeatedly held that where an employee's misconduct is contrary to the agency's mission, the agency need not present proof of a direct effect[sic-affect] on the employee's job performance.") (citing *Masino v. United States*, 589 F.2d 1048 (Ct. Cl. 1978) and *Giles v. United States*, 553 F.2d 647 (Ct. Cl. 1977)); *see also Masino*, 589 F.2d at 1056; *Giles*, 553 F.2d at 650.

However, the Board does not discuss the mission of the agency, which in this case is the Department of the Navy. *Board Opinion*, slip op. at 1. Instead, the Board, and the majority opinion, focus on the mission of the MWR Department and the purpose of Brown's position:

> The agency has established . . . that the *purpose of the appellant's position, and the MWR Department*, was to provide support for the Marines, and the families of those Marines while they are deployed. Since Major 'B' was a Marine Officer who was assigned to one of the very MEU's [sic-MEUs] that the MWR Department, and the appellant's position, existed to support, and that the affair took place during the time Major 'B' was deployed overseas with his unit, I find that the agency has sufficiently established that that the appellant's misconduct was antithetical to the *agency's very mission*.

Board Opinion, slip op. at 10-11 (emphasis added). In measuring employee conduct, it is the agency's mission at large that must be considered and not merely a division or lesser group within the agency. I have found no case from this, or any other, court, in which the mission of a unit smaller than the agency was considered. *See Allred*, 786 F.2d

at 1129 (focusing on the mission of the Department of Health and Human Services); *Stump v. Federal Aviation Admin.*, 761 F.2d 680, 681 (Fed. Cir. 1985) (focusing on the mission of the Federal Aviation Administration); *Giles*, 553 F.2d at 650 (focusing on the mission of the Internal Revenue Service); *Masino*, 589 F.2d at 1050, 1055 (focusing on the mission of the United States Customs Service). Further, the cases consistently focus on: (1) broad purposes, as opposed to more narrower purposes of a division or other lesser group within the agency; and (2) the public's perception, which is not likely to be concerned with or even aware of the divisions or lesser groups within an agency. *Allred*, 786 F.2d at 1131 (focusing on whether the misconduct might "undermine public confidence in the agency"); *Stump*, 761 F.2d at 681-82 (focusing on the broad purpose of the FAA and public confidence in that agency); *see also Borsari v. Federal Aviation Admin.*, 609 F.2d 106, 110 (2nd Cir.) (addressing "the goals of the FAA," the agency, to establish a mission connection), *cert. denied*, 464 U.S. 833 (1983); *Wild v. United States Dep't of Hous. and Urban Dev.*, 692 F.2d 1129, 1133 (7th Cir. 1982) (listing numerous examples of, and focusing exclusively on, broad purposes of various "agencies"). This would be a different case if the Board's decision and the evidence of record had established that Brown's misconduct had implicated this country's national defense, arguably the mission of the Department of the Navy. But the mission of the Navy was not discussed and I must conclude that the Board committed legal error by finding a nexus on this ground.

By focusing on the MWR Department, and then even on Brown's particular job, the Board and the majority are simply restating their belief that Brown's job performance would be impacted. However, again, there is no evidence showing any connection between Brown's misconduct and his job performance.

3. Off-Duty Conduct

The majority opinion cites the three cases of *Masino*, *Giles*, and *Allred*, all of which are binding on this court, for the proposition that off-duty conduct can give rise to a nexus. First, having cited *Brown v. Department of Transp.* earlier, I certainly do not quarrel with the position that off-duty conduct can give rise to a nexus. However, neither that case, nor any of the three raised by the majority opinion, reverses the long-standing rule that a "trust and confidence" nexus must contain a connection to the employee's actual job responsibilities and performance. Indeed, *Brown v. Department of Transp.* supports this rule, and the other three cases rely principally on the egregious nature of the misconduct or its impact on the agency's mission to establish a nexus.

The court in *Brown v. Department of Transp.* first examined the specific requirements of Brown's supervisory position and observed that "[c]ooperation, loyalty, and trust are particularly important among those managing the operation of a complex, sophisticated transportation system where the lives of hundred of innocent members of the public may . . . depend upon split-second judgment. Such need for trust was even more acute at the moment Brown uttered his remarks . . . ." *Id.* at 547. The court later concluded that it was "common sense" that Brown's actions "could easily turn into a situation where his loyalty to management could be cast in doubt—as indeed it was." *Id.* at 548. Thus, management's loss of trust and confidence in Brown was directly connected to his job performance.

In *Masino*, the Court of Claims upheld the removal of a Customs Inspector for the off-duty smoking and transporting of marijuana. The *Masino* court upheld the nexus finding based principally on the egregious nature of the conduct, a ground specifically not found in the present case. *See Masino v. United States*, 589 F.2d 1048, 1056, 1057 (Ct. Cl. 1978)

(stating in its analysis that "the transportation and use of the very contraband which a law enforcement officer is sworn to interdict, is clearly misconduct which 'speaks for itself,' " and summarizing in its conclusion that "[t]he misconduct speaks for itself"); *Board Opinion*, slip op. at 8 ("I do not find that [Brown's] misconduct in this instance was so egregious that 'it speaks for itself,' " and that a 'presumption of nexus' is applicable.").

Further, although the *Masino* court presented a subsidiary justification for finding a nexus, that justification is best characterized as being based on an adverse impact with the mission of the United States Custom Service, the agency in *Masino*. The *Masino* court stated that "Masino . . . was specifically charged with enforcing the laws concerning contraband, including marijuana. Since possession and/or use of marijuana is a violation of federal criminal statues, he was clearly not conducting himself in a manner to be expected of a Government employee engaged in law enforcement duties." *Masino*, 589 F.2d at 1056. The *Masino* court thus contrasted the broad purpose of "enforcing the laws concerning contraband," common to all Customs Inspectors, with Masino's obvious contravention of those same laws. *Id.* The implication is clear that the mission of the United States Customs Service was adversely impacted by Masino's behavior. *Allred*, 786 F.2d at 1131 (identifying *Masino* as a case where the nexus was based on an adverse impact on the mission of the agency).

In *Giles*, the Court of Claims upheld the removal of an Internal Revenue Service ("IRS") revenue officer for his own "willful, flagrant violation of tax laws" in not filing or not timely filing his state and federal tax returns over a three year period. *Giles*, 553 F.2d at 648, 649. The *Giles* court based its nexus finding on the impact that Giles' behavior had on the overall effectiveness and credibility of the agency, the IRS, stating that:

> If . . . taxpayers are encouraged to believe they can unilaterally determine whether or not to file . . . , the need for investigations increases and the efficiency of the Service is impaired. [Giles'] example undercuts the Service's efforts to encourage voluntary compliance and, if condoned, could impair the credibility of IRS with tax officers and the public generally.

Id. at 650; *see also Allred*, 786 F.2d at 1131 (identifying *Giles* as a case where the nexus was based on an adverse impact on the mission of the agency). Thus, the *Giles* court upheld a finding of nexus based on an impact to the IRS' mission, not to Giles' job performance.

In *Allred*, this court upheld the removal of an employee of the Department of Health and Human Services ("HHS") based on his conviction for child molestation. *Allred*, 786 F.2d at 1129-30. The misconduct was considered so egregious that a nexus was presumed, thus no connection to Allred's job performance needed to be shown. *See id.* at 1131.

The egregiousness of the misconduct also led the *Allred* court to uphold the finding of nexus on two secondary grounds, finding both an adverse impact on the mission of the agency, HHS, and a loss of management's trust and confidence in Allred's job performance. However, the *Allred* court tied the loss of trust and confidence to Allred's specific duties, which included "represent[ing] the agency before state and local governments, universities, hospitals, and various other grantees in preparing cost allocation plans to ensure the plans conformed with the agency's regulations." *Id.* at 1129. The *Allred* court found that management had lost trust and confidence in Allred's ability to represent HHS with these groups that were outside of the agency. *See id.* at 1131. Although the *Allred* court does not appear to have required any testimony from these clients of Allred's, as I would require in the present case, the egregiousness of Allred's

misconduct, and the attending presumption of nexus, precluded the need for doing so.

CONCLUSION

Although I cannot condone Brown's conduct, I also cannot concur in the majority opinion. It grants virtually unbridled discretion to management, allowing it to remove an employee based on disapproval of that employee's off-duty behavior that does not implicate either job performance or the mission of the agency, in this case the Navy. Accordingly, I respectfully dissent and would reverse the decision of the Board.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed Dec. 28, 2000]

00-3003

MICHAEL J. BROWN,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on January 4, 2001.

FOR THE COURT,

/s/ Jan Horbaly
JAN HORBALY
Clerk

Dated: December 28, 2000

cc: Kevin M. Grile
Marian E. Sullivan

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
DC-0752-97- 1018-I-1

MICHAEL J. BROWN,

Appellant,

v.

DEPARTMENT OF THE. NAVY,

Agency.

Aug. 10, 1999

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on January 2, 1998, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. C.F.R. § 1201.113(b).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See 5* U.S.C. § 7703(a)(l). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, which ever receipt occurs first. See 5 U.S.C. § 7703(b)(l).

FOR THE BOARD:

.Robert E. Taylor
ROBERT E. TAYLOR
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF VICE CHAIR BETH S. SLAVET

in

Michael J. Brown v. Department of the Navy,
MSPB Docket No. DC-0752-97-1018-I-1

I dissent from the majority's decision to deny the appellant's petition for review and to sustain his removal. I would grant the petition for review and reverse the appellant's separation because the agency did not meet its burden of proving nexus between the charged conduct and the promotion of the efficiency of the service.

Effective August 11, 1997, the appellant was removed from his position as a GS-9 Program Manager with the Morale, Welfare and Recreation Department (MWR) at Camp Lejeune, North Carolina, for "improper personal conduct having an adverse effect on the efficiency of the service." Initial Appeal File (IAF), Tab 3, Subtabs 4b & 4c. The improper personal conduct at issue was an alleged sexual relationship, from October 1995 until February 1996, between the appellant and the wife of a Marine Corps Major (Major B) while the Major was deployed overseas. IAF, Tab 3, Subtab 4c.

The majority, by denying review, is affirming the initial decision which found that the affair had occurred; that the agency had shown a sufficient nexus between the conduct charged and the promotion of the efficiency of the service; and that the penalty of removal was reasonable. IAF, Tab 21 (ID).

A review of the record reveals the following: The appellant and Major and Mrs. B had known each other since 1992, when their families were stationed at Quantico, Virginia, and both the appellant and Major B were Captains. Major B described the relationship as very friendly, but added that his wife had the stronger friendship with the appellant. IAF,

Tab 6, Subtab A, p. 31. The appellant subsequently resigned from active duty, but remained in the Reserves and relocated to Jacksonville, NC, where he obtained employment with MWR at Camp Lejuene. Major and Mrs. B were transferred to Camp Lejuene and the friendship resumed. Major B was deployed from Aug. 1995 to Feb. 1996, during which time the appellant and Mrs. B, as found by the administrative judge, had a sexual relationship.

Although I would not reverse the administrative judge's finding that the charged conduct occurred, I would find that the removal should be reversed because the agency has failed to show a nexus between such conduct and the promotion of the efficiency of the service. The nexus limitation imposed by 5 U.S.C. § 7513(a), requires an agency that takes action against an employee to show by preponderant evidence[1] "the necessary connection between the employee's off-duty misconduct and the employee's job-related responsibilities." *White v. U.S. Postal Service*, 768 F.2d 334, 335-36 (Fed. Cir. 1985). Even viewing the record in the light most favorable to the agency, it has not met this burden.

An agency may show nexus in one of three ways: (1) a rebuttable presumption of nexus that may arise in certain egregious circumstances based on the nature and gravity of the conduct; (2) a showing by preponderant evidence that the conduct affects the employee's or his co-workers' job performance, or management's trust and confidence in the employee's job performance; or (3) a showing by preponderant evidence that the conduct interfered with or adversely affected the agency's mission. *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 74 (1987).

---

[1] Preponderance of the evidence is defined by regulation as that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2).

There is no rebuttiable presumption of nexus.

The administrative judge found, and I agree, that the appellant's conduct was not so egregious as to create a rebuttable presumption of nexus. IAF, Tab 22 at 5. The agency does not challenge that finding. Therefore, the agency, and not the appellant, has the burden of proving that the adverse action promoted the efficiency of the service. *Id.* The agency has failed to do so.

The agency has failed to show by preponderant evidence that the conduct affected the employee's or his co-workers' job performance, or management's trust and confidence in the employee's job performance.

An agency must establish a vital connection between an appellant's off duty conduct and the efficiency of the service. *See Merritt v. Department of Justice,* 6 M.S.P.R. 585, 605 (1981); *Person v. U.S. Postal Service,* 22 M.S.P.R. 618, 620 (1984); *Moten v. U.S. Postal Service,* 42 M.S.P.R. 282, 287 (1989); *Beasley v. Department of Defense, 52* M.S.P.R. 272, 274 (1994). It is uncontroverted that the appellant's position involved administrative, planning, and budgetary duties, all of which required little, if any, contact with the wives of deployed Marines. Hearing Tape (HT) 1A. It is also undisputed that the appellant knew the woman with whom he engaged in the conduct prior to his employment with the agency. IAF, Tab 3, Subtab I. Finally, it is undisputed that the appellant received an excellent performance appraisal for the period of time during which the conduct occurred. HT 2A. Thus, the conduct did not arise out of his duties, nor was it in any way related to those duties, nor did it adversely affect his job performance.

Notwithstanding the specific evidence set forth above, the administrative judge, relying on the testimony of certain agency officials, found that the agency established by preponderant evidence that the appellant's conduct adversely

affected its trust and confidence in the appellant's ability to perform his duties, *Royster v. Department of Justice*, 58 M.S.P.R. 495, 500 (1993). For example, the administrative judge relied on the following evidence: Col. Stewart, the deciding official, stated that, the appellant lost his credibility, integrity and ability to function with both the Marines and their families, which in turn, directly interfered with his ability to accomplish his assigned mission. ID at 8-9, HT 4B; MWR Operations Officer Blare testified that when such an incident occurs, it takes all credibility away from the MWR Department, and that the Commander has to believe that there are "no foxes in the hen-house" when the Marine units are deployed. *Id.* at 9, HT 3A; Col. Helland, Commanding Officer of a Marine Expeditionary Unit, described the vital mission of the Marines and the support system the agency has in place for families, including the MWR Department. *Id.* at 9-10, HT 3A; Volunteer Coordinator Leferbe testified that the spouses of Marines know that the Marines have a very high ethical standard and that they expect the same from persons who work for the Marine Corps, and that the impact of the appellant's affair would threaten the volunteer program and place it in a less favorable and professional light. *Id.* at 10, HT 4A.

I note that this agency testimony with regard to "loss of confidence" is, however, both general and speculative. The appellant in his civilian capacity, is not a Marine and accordingly, is not subject to Marine Corps standards; the agency presented no direct or specific evidence—in the form of testimony, affidavits, or other statements—that other co-workers, or any of the families with whom the appellant worked, objected to his continued employment or became concerned over the functioning of the MWR. Because the appellant's position involved administrative, planning, and budgetary duties, all of which required little, if any, contact with the wives of deployed Marines, and his conduct neither

arose out of nor was related to his duties,[2] I am unwilling to base a nexus finding on the conclusory statements of agency officials that they lost trust in the appellant. Those conclusions rely on an overly broad and incorrect description of the appellant's job and are unsupported by specific evidence indicating that the appellant could not effectively carry out his responsibilities. *D.E. v. Department of the Navy*, 721 F.2d 1165, 1169 (9th Cir. 1983), *amended by*, 722 F.2d 1455 (9th Cir. 1983). (The court rejected the conclusory statements of agency officials that they no longer had "trust or confidence" in the appellant, because, in that case, like the present one, the agency failed to give any specific examples in support of those statements). Accordingly, I would not find that the agency has established, by preponderant evidence, the vital connection between the appellant's off duty conduct and the efficiency of the service. *Moten*, 42 M.S.P.R. at 289.

The agency has failed to show by a preponderance of the evidence that the conduct interfered with or adversely affected the agency's mission.

The agency also failed to show that the appellant's conduct is directly opposed to the agency's mission. *Allred v. Department of Health & Human Services*, 786 F.2d 1128, 1131 (Fed. Cir. 1986). Unlike the administrative judge, I cannot accept the general testimony that the appellant's conduct was antithetical to the MWR's mission of providing support for Marines and their families because of a concern that the appellant's conduct could cause deployed Marines to worry about the integrity of their marriages while they are deployed. *See generally* ID at 9-12. Whatever validity that speculative theory has in general, it has no application to the facts of this case. The appellant's relationship with the wife

---

[2] *Moten*, 42 M.S.P.R. at 289 (nexus not found where Board noted that there was no evidence that the appellant met the girl with whom he had sexual intercourse as a result of his employment).

of the deployed Marine ended a year and a half before his removal, was private and consensual, and the two parties neither met through, nor dealt-with each other as a result of the appellant's employment. Inasmuch as egregious misconduct is not involved, the government's inquiry into the private lives of its employees is limited, and does not allow the discharge of an employee merely because his personal conduct during off-duty hours incurs the disapproval of his supervisors. *See Major v. Hampton,* 413 F. Supp. 66, 70 (E.D. La. 1976) (Internal Revenue Service agent used an apartment for trysts when off-duty); *Norton v. Macy,* 417 F.2d 1161, 1165 (D.C. Cir. 1969) ("[T]he notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity."). In the absence of any substantive evidence in support of its assertion, I would find that the agency has not demonstrated by preponderant evidence that the appellant's off duty conduct interfered with the agency's mission.

Accordingly, the initial decision should be reversed.

/s/ Beth S. Slavet
BETH S. SLAVET
Vice Chair

AUG 10, 1999

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER
DC-O752-97- 1018-I-1

MICHAEL J. BROWN,

Appellant

v.

DEPARTMENT OF THE NAVY,

Agency

Jan. 2, 1998

BEFORE: Michelle M. Hudson Administrative Judge

INITIAL DECISION

On September 4, 1997, the appellant filed a timely appeal from the agency's action removing him from the position of Area Program Manager, GS-1101-09, for the Morale, Welfare and Recreation (MWR) Department, Operations Divisions, Marine Corps Base, Camp Lejeune, North Carolina, effective August 11, 1997 The Board has jurisdiction over this appeal. 5 U.S.C. §§ 7511(a)(1)(A), 7512(1), 7513(d), 7702(a)(1). For the reasons that follow, the agency's action is AFFIRMED.[1]

---

[1] The appellant requested a hearing in connection with his appeal, which was held by video-conference on November 20, 1997. I note that the exhibit (a verbatim transcript of the agency's military "Board of Inquiry") submitted with the "Agency's First Prehearing Submissions,"

BACKGROUND

By notice dated June 2, 1997, Ron S. Blare, Director, Operations Division, MWR Department, proposed to remove the appellant based on the charge of "improper personal conduct." *See* Appeal File (AF), Tab 3, Agency's Response, tab 4f. The alleged improper personal conduct was that the appellant had a sexual relationship with the wife of a deployed Marine officer during the period from October of 1995 until February of 1996, while the officer was deployed overseas with his unit. The appellant provided both an oral and written response to the proposed action. *See id.*, tabs 4d and 4e. In a decision letter dated July 29, 1997, Col. J.R. Stewart, Assistant Chief of Staff, MWR Department, found that appellant had engaged in the misconduct charged, and he decided to remove the appellant effective August 11, 1997. *See id.*, tab 4c The appellant filed the instant appeal for the decision. *See* AF, Tab 1.

ANALYSIS AND FINDINGS

In an action taken under 5 U.S.C. § 7513, the agency has the burden of proving the merits of its charges by a preponderance of the evidence. The agency must also prove that its action is for such cause as promotes the efficency of

---

dated October 31, 1997, has not been considered, in light of my ruling that the agency should call those witnesses to testify at the Board proceeding if it deemed that testimony relevant and material to this appeal, and in light of my ruling in an Order issued on November 19, 1997, that the Board will not apply the Doctrine of Collateral Estoppel to the charged misconduct which formed the basis for the removal action. *See* AF, Tabs 6, 8, 10, 12, 13, 15, 16, 17, 18, 19 and 20. I note also that the appellant's Exhibit J (a tape-recorded interview of Allison Bowersox) is being returned to the appellant's representative as was agreed to during the November 7, 1997 prehearing conference after a ruling was made concerning that matter. *See* AF, Tabs 9 and 12.

the service and that the penalty is reasonable. 5 U.S.C. §§ 7701(c)(1)(B) and 7513(a); *see Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 301 (1981); *Merritt v. Department of Justice,*6 M.S.P.B. 493, 6 M.S.P.R 585, 605 (1981). Preponderance of the evidence is defined by regulation as that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2).

The agency has established by preponderant evidence that the appellant committed the misconduct charged

In the June 2, 1997 proposal notice, the specifications of the "improper personal conduct" charge[2] are essentially as follows. *See* Agency's Response, tab 4f. In a written statement provided recently to Jim Mitchell, Director of Review and Analysis (the person assigned to investigate the charge), Major "B" of the U.S. Marine Corps, reported that the appellant had an adulterous relationship with his wife, Mrs. "B", between October 1995 and February of 1996.[3] Major "B" explained in his statement that he first met the appellant when both of their families were neighbors in Quantico, Virginia. The neighborly relationship that had developed between the appellant's family and the Major's was facilitated by the friendships that developed between the children of the two families. While at Quantico, the appellant separated from active duty with the Marine Corps and

---

[2] The specific wording of the charge is actually "[I]mproper personal conduct having an adverse effect on the efficiency of the service". *See* Agency's Response, tab 4f. However, as noted previously, whether there is a sufficient nexus between the misconduct charged and the promotion of the efficiency of the service, is a separate element of the agency's case, which will be addressed next.

[3] For purposes of this decision, the person with whom the appellant is charged with having an adulterous relationship with will be identified only as Mrs. "B", and her husband, as Major "B".

divorced his wife. Both the appellant and Mrs. "B" eventually relocated to Jacksonville, North Carolina, where the appellant entered a reserve unit and gained employment with the agency's MWR Department in April of 1995. In the meantime, Major "B" and his family were transferred to the Marine Corps Base at Camp Lejeune, and the appellant became a frequent visitor to their home. With the remarriage of the appellant's ex-wife and her move with the children to Pennsylvania, the appellant's visits to the "B"s home ceased. Major "B" was deployed in August of 1995, whereupon the appellant began visiting Mrs. "B", and in October of 1995, began an adulterous affair with her. The relationship ended with the return of Major "B" in February of 1996. Upon learning of the affair in January of 1997, Major "B" felt compelled to report it so that appropriate action could be taken by the Marine Corps relative to the appellant's status as a Marine officer in a reserve unit. Major "B" E-mailed the appellant a couple of times informing him of his (Major's "B's) intent, offering him an opportunity to tell his side of the story, and agreeing not to report the affair if the appellant voluntarily resigned from the military reserves. During the first week of May in 1997, Major "B" received a phone call from the office of Attorney Robert Vaughan Taylor, and arranged to meet with him on May 5, 1997. At that meeting, Mr. Taylor explained to Major "B" that the appellant was his client, and that it was the appellant's position that Major "B" was blackmailing him with the E-mailed messages. Mr. Taylor further stated that the appellant was willing to provide a sworn statement that he never had an adulterous relationship with Mrs. "B".

By written statement dated May 7, 1997, Mrs. "B" confirmed with shame that she did, indeed, have a sexual relationship with the appellant during the period from October 1995 until February 1996, while her husband was deployed. On May 22, 1997, Mr. Mitchell, the investigator, conducted and investigatory interview with the appellant. The

appellant's counsel was present, and upon the advise of his counsel, the appellant refused to answer any questions.

In support of the charge, the agency submitted a copy of the "Preaction Investigation" report dated May 23, 1997, that was prepared by Mr. Mitchell. *See* Agency's Response, tab 4g. The report contains an "official" unsworn statement from Major "B" (undated) concerning the alleged affair between Mrs. "B" and the appellant, and a sworn statement from Mrs. "B" dated May 7, 1997, in which admits to having had a sexual relationship with the appellant which she states began in October of 1995, while her husband was on a six-month deployment. *See* Agency's Response, tab 4g. The Preaction Investigation also includes copies of two E-mail messages dated March 19 and 26, 1997, from Major "B" to the appellant, in which Major "B" informed the appellant that he knew of the affair, provided the appellant with an opportunity to tell his side of the story, and informed the appellant that he would forward a letter detailing the appellant's alleged misconduct to several "General Officers" so that appropriate action could be taken if the appellant did not resign his commission. *See Id.* The report also contains a statement from Mr. Mitchell dated May 22, 1997, in which he reports that the appellant would not provide any response to questions asked of him concerning the charged misconduct, on the advice of counsel. *See id.*

At the hearing, Mrs. "B" testified in detail about how she first met the appellant, and the development of their relationship over the years since they first met in Quantico, Virginia. Mrs. "B" testified that while her husband was deployed overseas with his unit, she and the appellant began a sexual relationship. Mrs. "B" testified that she believed that they had fallen in love, that they had sex approximately twenty times during that time period, and that the relations all took place at the appellant's mobile home. Mrs. "B" explained that on some occasions, she would drive to the

appellant's house and park her car far enough to get it out of plain view, and that on other occasions, she would meet him at a store, leave her car there, and the appellant would pick her up and they would go to his home. Mrs. "B" also testified that the appellant has a "hairy chest" and that she knew that he had had surgery and had a scar on his abdomen. She also described the appellant's bedroom, as having wood-paneled walls, one window opposite the bed, a chest of drawers to the right when you walk into the bedroom, and a shelf on the left-hand side of the room. Mrs. "B" also recalled that there was aluminum foil on the window, and that it was always cold, although she did not recall if there were any pictures or unique items of furniture in the bedroom.

In his oral and written responses to the charge, the appellant neither admitted nor denied the charged misconduct.[4] *See* Agency's Response, tabs 4c. d and e. As discussed previously, however, through his attorney, he denied to major "B" that the affair took place, and he denied having the affair during his testimony at the Board hearing. The appellant stated that he believed that Mrs. "B" may have been untruthful concerning the matter because she had showed him some letters that Major "B" had written her while he was deployed overseas, in which Major "B" said that he wanted to watch her pick up some men at a bar and watch her have sex with them. Mrs. "B" allegedly told the appellant at that time that he was the only one that she would be comfortable being with, and that he told her no. The appellant also speculated that Mrs. "B" wrote the statement admitting to the alleged affair because of some kind of pressure from Major "B".

---

[4] The appellant stated in his June 18, 1997 reply to the proposal notice that he would not "bother to deny the allegations" because experience has shown him that he would not be believed, because a denial would do no good, and because he was still facing the possibility of criminal charges from the Marine Corps on the matter. *See* Agency's Response, tab 4e.

I have carefully considered all of the evidence concerning the misconduct charged, which consist of the appellant's testimony, Mrs. "B" testimony and her prior statement, as well as the statement of Major "B" concerning his knowledge of the affair as relayed to him by his wife. I note first that, while it appears from the applicable provisions of the North Carolina General Statute, 14-184, that the confessions or admissions of one of the persons involved in an alleged adultery cannot be used in evidence against the other in a criminal prosecution of adultery and fornication, the appellant has not identified, and I am not aware of any such prohibition applicable to a removal action involving a Federal employee under 5 U.S.C. Chapter 75. *See* AF, Tab 9, App's Ex. D. Having considered the evidence; I find Mrs. "B" admission of the sexual relationship with the appellant to be more credible than his denial. *See Rogers v. Department of Justice,* 60 M.S.P.R. 377, 386 (1994).

First, Mrs. "B"s demeanor during her testimony was particularly persuasive, in that she appeared to be extremely remorseful and ashamed about her indiscretion, as well as sincere. Her testimony given at the hearing was also consistent with her earlier May 7, 1997 statement, and that of Major "B" contained in the record, and her description of the appellant's scar on his abdomen, his hairy chest, in addition to her detailed description of the appellant's bedroom, corroborated her testimony that they affair took place.[5]

---

[5] I have also considered the appellant's testimony that Mrs. "B" had in fact been to his home with her children, in explanation for the Mrs. B's ability to describe his home, and that they had previously been on the beach together at which time he was not wearing a shirt, as an explanation is to how she could describe his body. I note in this regard, however, that the appellant also testified that he did not believe that his scar was visible over his shorts while on the beach, and that Mrs. "B" testified convincingly that she did not see the interior of the appellant's home prior to them having begun their sexual relationship, and that she had "just stepped inside" of his house on the previous occasion.

Moreover, there is nothing in the record indicative of any plausible reason why Mrs. "B" would falsely admit to the adulterous affair with the appellant, had it in fact not occurred, when clearly she also had much to loose by the admission. On the contrary, Mrs. "B" testified that she is currently still married to Major "B", that they have been reassigned to another geographic location, and that they are trying to work things out and move on with their lives. The appellant's speculation as to why Mrs. "B" may have lied concerning the matter is inherently improbable, and I am not convinced that any pressure she would have received from her husband would have caused her to admit to an affair that had not taken place.

In light of the above, I find that the agency's evidence in support of its charge is such that a reasonable person, considering the record as a whole, would accept as sufficient to find that the appellant engaged in a sexual relationship with the wife of a deployed Marine as charged is more likely true than not true. *See* 5 C.F.R. § 1201.56(c)(2). The agency, therefore, has proven its charge by preponderant evidence and the charge is sustained.

The agency has established that there is a sufficient nexus between the misconduct charged and the promotion of the efficiency of the service

The Board generally recognizes three independent means by which an agency may show a nexus linking an employee's off-duty misconduct with the efficiency of the service: (1) a rebuttable presumption of nexus that may arise in "certain egregious circumstances" based on the nature and gravity of the misconduct; (2) a showing by preponderant evidence that the misconduct affects the employee's or his co-worker' job performance, or management's trust and confidence in the employee's job performance; and (3) a showing by preponderance evidence that the misconduct interfered with or adversely affected the agency's mission. *See Kruger v.*

Department of Justice, 32 M.S.P.R. 71, 74 (1987)[6] *Royster v. Department of Justice*, 58 M.S.P.R. 495, 500 (1993); *Johnson v. Department of Health and Human Services*, 22 M.S.P.R. 521, 526 (1984); *Merritt v. Department of Justice*, 6 M.S.P.R. at 605. A presumption of nexus may arise in instances where an employee's conduct is so egregious that "it speaks for itself." *See Allred v. Department of Health and Human Services*, 786 F.2d 1128, 1130 (Fed. Cir. 1986). In that instance, the presumption "places an extraordinary burden on an employee, for it forces him to prove the negative proposition that his retention would not adversely affect the efficiency of the service." *See id.*

In this instance, the appellant argues that there is no nexus between the charged misconduct and the promotion of the service of the service. *See* AF, Tab 9. The agency argues that nexus has been established in this case by all three means by which an agency may establish nexus. *See* AF, Tabs 3, 7, and Agency's Closing Remarks at November 20, 1997 Hearing.

First, contrary to the agency's argument, I do not find that the appellant's misconduct in this instance was so egregious that "it speaks for itself," and that a "presumption of nexus" is applicable. *See Allred*, 786 F. 2d at 1130. The agency therefore, and not the appellant has the burden of proving that the adverse action promoted the efficiency of the service. I find, however, that the agency has proven nexus in this instance by showing by a preponderance of the evidence both that the appellant's misconduct affected management's trust and confidence in his job performance; and that it interfered with and adversely affected the agency's mission. *See Kruger*, 32 M.S.P.R. at 71.

---

[6] I note that the Board explicitly recognized for the first time in *Kruger*, 32 M.S.P.R. at 74, that nexus under the third category may be proven by showing that an employee engaged in off-duty misconduct that "is directly opposed to the agency's mission," *Allred v. Department of Health and Human Services*, 786 F.2d 1128, 1131 (Fed. Cir. 1986).

In the July 29, 1997 decision letter, Col. Stewart stated, in pertinent part, that the appellant's misconduct directly interfered with his responsibility to assist deployed Marines by providing support to their spouses. *See* Agency's Response, tab 4c. He stated that the Program Manager should provide a security network for spouses of deployed Marines, and that the appellant's misconduct was contrary to this mission. He further stated that deployed Marines should not have to concern themselves with the integrity of their marriage when their spouses interact with the Program Managers, and that successful accomplishment of the appellant's mission required that his interaction with Marines be founded on trust, respect and confidence. Col. Stewart additionally stated that the appellant's position required him to interact with both the families of Marines, and with the Marines themselves. He explained that the Marines adhere to the core values of honor, courage and commitment, and that in the case of both the Marines and their families, the appellant lost his credibility, integrity and ability to function with these people as a result of his misconduct, and that this directly interfered with his ability to accomplish his assigned mission. Col. Stewart also testified at the hearing concerning the above.

Steve Blare, Operations Officer for the MWR Department, testified that the appellant's misconduct was very damaging to the MWR Department. Mr. Blare stated that when an incident like what happened in the appellant's case occurs, it takes all of the credibility away from the MWR Department, and what they are about. Mr. Blare explained that the Marine major whose wife was involved in the relationship with the appellant was assigned to one of the very Marine Expeditionary Units (MEU) that the appellant's Program Manager position, and the MWR Department, existed to support. He also noted that the Marine Major was deployed overseas with his unit when the affair between the appellant and. his wife took place. Mr. Blare emphasized that it is the

appellant's position that is most important to the nexus requirement in this case, in that the primary purpose of that position is to make life better for the Marines and their spouses who come in contact with the MWR Department, and that the Commander has to believe that there are "no foxes in the hen-house" when the Marine unites are deployed.

Col. Helland, Commanding Officer of a Marine Expeditionary Unit, testified at the hearing, describing in detail the vital mission of the Marines, their frequent deployments (generally for six-month periods), and the resulting stress of those deployments on both the Marines and their families. He described the support systems that the agency has in place for those families, one of which is the MWR Department within the Operations Divisions, where the appellant was employed as a Program Manager. Col. Stewart emphasized that the MWR exists to support the Marines and their families, and that this should be the sole focus of it. Col. Stewart testified that the Program Manager position within the MWR Department is a "facilitator," and that the position makes it easier for him to make facilities and other resources available to the Marines and their families. He also explained that he needs to have a degree of trust in the incumbent of the Program Manager position, in that the incumbent of that position works with money, people, and has access to facilities. He also stated that, as a Commanding Officer of an MEU, he believes that he could bypass the Program Manager, and go directly to the personnel involved in the activity, and that if the Program Manager is bypassed by the Commanders, the work does not get done efficiently.

Debbie Leferbre, Key Volunteer Coordinator,[7] testified that she works with the MWR Program Manager to facilitate the different functions that they are involved with. Mr. Leferbre

---

[7] The Key Volunteer Program is a component of the Family Readiness Program. *See*. AF, Tab 9, Appellant's Ex. E.

described the stress on families of deployed Marines and the support services that are available to deal with that stress. Ms. Leferbre stated that the spouses of Marines know that the Marines have a very high ethical standard, and that they expect the same from persons who work for the Marine Corps. Ms. Leferbre stated that she read an account of the appellant's affair in the newspaper. She also stated that the impact of such an indiscretion by the MWR Program Manager would also threaten the Key Volunteer Program, and place it in a less favorable and professional light. Ms. Leferbre explained that because both the MWR Department and the Key Volunteer program provide support services to the families, and any negative conduct by any official connected with the support programs effect the credibility of them all.

The agency also submitted a copy of a newspaper article printed in the "News and Observer" in Raleigh, North Carolina on September 27, 1997, concerning the appellant's affair with the wife of a Marine officer who was serving overseas. *See* Agency's Response, tab 4a. The article entitled "Civilian deserves the boot" named the appellant and stated that he was a Program Manager for the MWR Department at Camp Lejeune, and a former Marine Captain. *See Id.*

The agency has established with its evidence on the nexus issue that the purpose of the appellant's position, and the MWR Department, was to provide support for the Marines, and the families of those Marines while they are deployed. Since Major "B" was a Marine Officer who was assigned to one of the very MEU's that the MWR Department, and the appellant's position, existed to support, and that the affair took place during the time Major "B" was deployed overseas with his unit, I find that the agency has sufficiently established that that the appellant's misconduct was antithetical to the agency's very mission. The Board has held that nexus linking an employee's off-duty misconduct with

the efficiency of the service may be proven by showing that an employee engaged in off-duty misconduct that is directly opposed to the agency's mission. *See Kruger,* at 74. Moreover, where the employee's off-duty misconduct is antithetical to the agency's mission, the agency is not required to demonstrate a specific impact on the appellant's job performance or the efficiency of the service. *See Royster,* 58 M.S.P.R. at 500. The agency correctly argues that clearly they should not have to retain an employee who instead of assisting its deployed Marines, as is the purpose of the MWR and the Program Manager position, has an adulterous affair with the wife of one of those very Marine officers.

In any event, I find that the agency has additionally proven nexus by showing by preponderant evidence that the appellant's misconduct affected management's trust and confidence in his job performance. The agency established through the testimony of Col. Stewart and Col. Helland that, because of the appellant's misconduct, his effectiveness as a Program Manager has been compromised. They explained that, because of the appellant's misconduct, the Commanders no longer trusted him, and that they would no longer use him use him to facilitate activities. Col. Stewart and Col. Helland also stated that the MWR's credibility had also been harmed by the affair. The Board has held that where the employee's position required him to have confidence and respect of his agency's clients, there was sufficient nexus between the conduct and the employee's job related responsibilities. *See Backus v. Office of Personnel Management,* 22 M.S.P.R. 457, 461 (1984).

In addition, the agency has established that the notoriety of the affair because of the newspaper report which identified the appellant as a Program Manager for the MWR Department, also tarnished his credibility and effectiveness in that position. *See Gallagher v. U.S. Postal Service,* 6 M.S.P.R. 572, 573 (1981). I find, therefore, that the agency

has established by preponderant evidence that there is a sufficient nexus between the appellant's misconduct and the promotion of the efficiency of the service in this instance, and that it has met its burden on this element.

The removal penalty based on the sustained charge was reasonable

The Board's function in reviewing an assessed penalty for sustained charges is limited to assuring that the agency's managerial judgment has been properly exercised within the tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). The Board noted that its role in the penalty process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance; as such an approarch would fail to accord proper deference to the agency's primary discretion in managing its workplace. *See id.*, at 306. The Board will not disturb an agency's penalty if it is the maximum reasonable penalty which may be imposed after considering all of the relevant factors. *See Davis v. Department of the Treasury*, 8 M.S.P.R. 317, 320-21 (1981).

The appellant's asserts that the penalty imposed was too harsh, and he argues that the maximum reasonable penalty would have been a reassignment away from Camp Lejeune. In making the penalty determination, Col Stewart stated that he considered that: (1) the appellant had no prior disciplinary record; (2) he was employed in his civilian position for approximately two years; (3) the appellant's misconduct directly interfered with his responsibility to assist deployed Marines and their families; (4) he no longer had faith in the appellant's ability to function effectively as a Program Manager; (5) that the appellant was on notice that his conduct was unacceptable; (6) his failure to accept responsibility for his actions detracted from his rehabilitative potential; (7) the agency's Table of Penalties listed penalties of reprimand to

removal for a first offense; and (8) that the appellant requested a reassignment in lieu of removal, but there were no positions available for which he was qualified. *See* Agency's Response, tab 4c. During his testimony, Col Stewart also testified that he did not choose to suspend the appellant because the misconduct became known on the base, noting that it was also reported in the newspaper. Col Stewart additionally testified that he does not believe that any Commander would have allowed him to place the appellant in another Program Manager position, or any other position, because people would not use him.

I find that the deciding official considered relevant mitigating and aggravating factors and that the penalty selected was not unreasonable under the circumstances. I note, in particular, that the appellant had previously received a Letter of Admonishment in January of 1997 because of an inappropriate personal relationship he allegedly had with the wife of an enlisted Marine, and although he denies any misconduct concerning that incident, it nonetheless shows that he was clearly on notice that such behavior was unacceptable. *See* Agency's Response, tab 4f. While I have also considered the appellant's argument that he should have been reassigned in lieu of removal, Col. Stewart testified that he considered the appellant's request, but that there were no other positions available for which he qualified either in the MWR Department, or at Camp Lejeune, and there is nothing in the record to contradict that testimony. While I have seriously considered the appellant's argument that he should have been reassigned to another agency facility outside of Camp Lejeune, Col Stewart testified that he had no authority to reassign the appellant anyplace else. Since there is no evidence, or even argument, to contradict Col. Stewart's testimony concerning his lack of authority to reassign the appellant outside of Camp Lejeune, I cannot find that his decision to remove the appellant was unreasonable under the

circumstances. The removal action, therefore, will not be disturbed.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/s/ Michelle M. Hudson
MICHELLE M. HUDSON

APPENDIX E

RELEVANT PROVISIONS OF TITLE 5, UNITED STATES CODE

§ 2302 Prohibited personnel practices

* * * *

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

* * * *

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

* * * *

§ 7512. Action covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefore at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefore, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

§ 7703 Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for the attorney fees, in which case the agency responsible for talking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within

60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a (c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216 (b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions founds to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b) (2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order of decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service

law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Boards for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Boards and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals

Supreme Court, U.S.
FILED
MAY 29 2001
OFFICE OF THE CLERK

No. 00-1496

In the Supreme Court of the United States

MICHAEL J. BROWN, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
STUART E. SCHIFFER
Acting Assistant Attorney General
DAVID M. COHEN
KATHRYN A. BLEECKER
MARIAN E. SULLIVAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the decision of the Merit Systems Protection Board that the agency had established a sufficient nexus between the employee's misconduct and the promotion of the efficiency of the service was supported by substantial evidence.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Allred v. *Department of Health & Human Servs.*, 786 F.2d 1128 (Fed. Cir. 1986)	5, 6, 8
Bonet v. *United States Postal Serv.*, 661 F.2d 1071 (5th Cir. 1981)	8
Brook v. *Corrado*, 999 F.2d 523 (Fed. Cir. 1993)	5, 6, 7
Cheeseman v. *OPM*, 791 F.2d 138 (Fed. Cir. 1986), cert. denied, 479 U.S. 1037 (1987)	4
D.E. v. *Department of the Navy*, 721 F.2d 1165, amended, 722 F.2d 455 (9th Cir. 1983)	10
Giles v. *United States*, 553 F.2d 647 (Ct. Cl. 1977)	7, 8
Gloster v. *GSA*, 720 F.2d 700 (D.C. Cir. 1983)	10
Hayes v. *Department of the Navy*, 727 F.2d 1535 (Fed. Cir. 1984)	5
Masino v. *United States*, 589 F.2d 1048 (Ct. Cl. 1978)	8
Morales v. *MSPB*, 932 F.2d 800 (9th Cir. 1991)	10
Oshiver v. *OPM*, 896 F.2d 540 (Fed. Cir. 1990)	4
White v. *United States Postal Serv.*, 768 F.2d 334 (Fed. Cir. 1985)	5
Wild v. *HUD*, 692 F.2d 1129 (7th Cir. 1982)	7
Williams v. *Department of the Army*, 715 F.2d 1485 (Fed. Cir. 1983)	9

Statutes and regulations:

5 U.S.C. 7513(a)	10
5 U.S.C. 7702(a)(1)	9

Statutes and regulations—Continued: Page

5 U.S.C. 7703(a) 4
5 U.S.C. 7703(b)(1) (1994 & Supp. V 1999) 9
5 U.S.C. 7703(b)(2) 9
5 U.S.C. 7703(c) 4, 10
5 C.F.R.:
Section 1201.113(b) 3
Section 1201.115 3

In the Supreme Court of the United States

No. 00-1496

MICHAEL J. BROWN, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 229 F.3d 1356. The opinion of the Merit Systems Protection Board (MSPB or Board) (Pet. App. 27a-34a) is reported at 83 M.S.P.R. 230. The initial decision of the MSPB administrative judge (Pet. App. 35a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2000. A petition for rehearing and rehearing en banc was denied on December 28, 2000 (Pet. App. 26a). The petition for a writ of certiorari was filed on March 28, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, Michael J. Brown, was removed by the Department of the Navy from his position of Program Manager, Morale, Welfare and Recreation Department (MWR), Operations Division, Camp Lejeune, North Carolina, for misconduct. Pet. App. 1a-2a. Mr. Brown was found to have engaged in an inappropriate personal relationship with the wife of one of the Marine Corps officers from one of the units he was charged to support. *Ibid.* The decision to remove him was based on the finding that this conduct had jeopardized the trust, credibility, and integrity essential to Mr. Brown's effective job performance. *Id.* at 4a-8a.

In his capacity as an MWR program manager, petitioner coordinated activities to provide support for deployed Marines and their families. Pet. App. 4a. Petitioner planned, developed, and coordinated recreational and leisure time activities and other MWR events designed to contribute to the mental well-being of the participants. *Id.* at 4a-5a. The participants were active-duty Marines and sailors as well as their dependents. *Ibid.* Petitioner worked closely with commanders and their staffs as well as Marine spouses to fulfill his support role. *Id.* at 5.

Colonel Stewart, Assistant Chief of Staff, MWR Division, decided to remove petitioner from service based upon his determination that petitioner's misconduct interfered with petitioner's responsibilities to assist deployed Marines because those responsibilities required "that his interaction with Marines be founded on trust, respect and confidence." Pet. App. 44a. Colonel Stewart further found that as a result of petitioner's misconduct, petitioner had "lost his credibility, integrity and ability to function with" the Marines and

their families. *Ibid.* Because petitioner's misconduct had interfered with his ability to interact with Marines and their families, Colonel Stewart decided that it compromised petitioner's ability to perform his assigned mission. *Ibid.* Based on these findings, Colonel Stewart determined that petitioner's removal was necessary to promote the efficiency of the service. *Ibid.*

Petitioner filed an appeal with the MSPB. After conducting a hearing, the administrative judge found that petitioner had engaged in the alleged misconduct and that the agency had established the nexus between the misconduct and the efficiency of the service. Pet. App. 46a-47a. The finding of nexus was based upon the determinations that the misconduct adversely affected the agency's mission and management's trust and confidence in petitioner's job performance. *Ibid.* The administrative judge also determined that the penalty of removal was reasonable. *Id.* at 49a.

By order dated August 10, 1999, the full MSPB denied petitioner's petition for review of the initial decision because the petition failed to meet the criteria set forth at 5 C.F.R. 1201.115. Pet. App. 27a. Accordingly, the initial decision became the final decision of the Board. See 5 C.F.R. 1201.113(b).

The court of appeals affirmed the decision of the Board (Pet. App. 1a-25a). The court held that substantial evidence supported the Board's finding of a nexus between petitioner's misconduct and "both the mission of his agency in general and his job responsibilities in particular." *Id.* at 7a. The court repeatedly noted that misconduct such as petitioner's would not provide sufficient basis for disciplinary action in many other situations, but that the circumstances of petitioner's position and the role of the MWR department provided the necessary nexus. *Id.* at 7a, 11a. The court also

noted that, absent a mistake of law regarding the test to apply in reviewing nexus determinations, its review of the case was limited and that the Board's decision must be affirmed if supported by substantial evidence. *Id.* at 3a.

Writing in dissent, Judge Linn took the view that the Board's determination of nexus was not supported by substantial evidence. Pet. App. 14a. Specifically, Judge Linn regarded the evidence in support of the effect of petitioner's misconduct upon the trust and confidence of his supervisors to be "conjectural, speculative, or unrelated to petitioner's actual job responsibilities." *Id.* at 16a. Judge Linn also believed the Board's and the majority's focus upon the mission of the MWR department, rather than the Navy as a whole, to be legally erroneous. *Id.* at 20a-21a.

ARGUMENT

The court of appeals correctly determined that the Board's decision was supported by substantial evidence. Petitioner fails to raise a legal question of general importance and there is no conflict among the courts of appeals on the matter. Therefore, further review is not warranted.

The scope of review of Board decisions is established by statute and is extremely limited. Pursuant to 5 U.S.C. 7703(a), the courts of appeals must affirm decisions of the MSPB unless they are "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. 7703(c). See *Oshiver* v. *OPM*, 896 F.2d 540, 541 (Fed. Cir. 1990); *Cheeseman* v. *OPM*, 791 F.2d 138, 140 (Fed. Cir. 1986), cert. denied, 479 U.S. 1037 (1987);

Hayes v. *Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984). The court of appeals will not overturn an MSPB finding of nexus if it is supported by substantial evidence, *i.e.*, "such relevant evidence as might be accepted by a reasonable mind as adequate to support the conclusion reached." *White* v. *United States Postal Serv.*, 768 F.2d 334, 336 (Fed. Cir. 1985).

The court of appeals in this case found that the MSPB's decision was supported by substantial evidence. Specifically, the court found that the testimony of petitioner's superiors and co-workers provided ample basis for the Board's determination that the agency had shown the necessary nexus between petitioner's misconduct and his job responsibilities. Pet. App. 7a.

Petitioner first asserts that his petition should be granted because the issue regarding the nexus standard is an important one. The nexus standard is important, but the decision by the Federal Circuit did not alter the established test in any way. As the Federal Circuit has repeatedly held, to establish nexus, an agency must demonstrate that the employee's misconduct so interferes with the efficiency of the service that the employee must be removed. See, *e.g.*, *Brook* v. *Corrado*, 999 F.2d 523, 527 (Fed. Cir. 1993); *Allred* v. *Department of Health & Human Servs.*, 786 F.2d 1128, 1130 (Fed. Cir. 1986). That nexus requirement necessarily depends on context and the facts and circumstances of each case. In this case, the court of appeals determined that the Board's finding of nexus was supported by the testimony of petitioner's co-workers regarding the effect of his misconduct on the mission of the MWR department and the testimony of supervisors that Marine commanders would no longer allow their unit personnel to work with petitioner because of his misconduct. Pet. App. 5a-7a. The premise of peti-

tioner's assertion that the decision by the Federal Circuit impermissibly expands the scope of activities which may warrant removal is incorrect. The nexus standard does not focus upon the nature of the misconduct itself. Rather, the standard requires an agency to establish a connection between the misconduct and the mission of the agency or the employee's job responsibilities. See, *e.g.*, *Brook*, 999 F.2d at 527 (electrical technician's conviction for illegal drug possession jeopardized management's trust and confidence in technician's ability to maintain critical electrical systems). The court of appeals recognized that petitioner's misconduct would not warrant removal in many other employment situations. Pet. App. 7a. The court found, however, that petitioner's position as an MWR program manager required that he provide support to Marines and their families whose trust and confidence in petitioner—essential to his effective job performance—was jeopardized by his misconduct. *Ibid.* Accordingly, the court properly affirmed the Board's finding of nexus.

Petitioner next argues that the petition should be granted because the court of appeals decided the case incorrectly by affirming the Board's finding of nexus based, in part, upon management's loss of trust and confidence in his performance ability. Pet. 11-15. Petitioner also argues that there was no evidence presented concerning the impairment of petitioner's future job performance. Pet. 15. Despite petitioner's protests, the Federal Circuit has repeatedly held that management's loss of trust and confidence provides ample basis for a nexus determination. See, *e.g.*, *Brook*, 999 F.2d at 527; *Allred*, 786 F.2d at 1131. The Federal Circuit and other courts have also held that the agency need not wait until the expected effect upon job

performance or agency mission occurs before removing the employee. See, *e.g.*, *Brook*, 999 F.2d at 527 ("Entrusting to a convicted drug dealer unsupervised control over the entire Goddard electrical system and potential responsibility for the safety of persons and equipment could seriously undermine the public's confidence in the agency's ability to perform its mission. NASA need not wait until Mr. Corrado makes a mistake on the job before removing him."); *Wild* v. *HUD*, 692 F.2d 1129, 1133 (7th Cir. 1982) (HUD not required to continue employing appraiser publicly known to be moonlighting as a "slumlord" until it can conclusively prove actual job performance deficiency; employee's off-duty conduct that is fundamentally incompatible with agency's public duty sufficiently establishes harm to the credibility and effectiveness of the agency); *Giles* v. *United States*, 553 F.2d 647, 650 (Ct. Cl. 1977) (testimony of supervisor that IRS employee's failure to file timely tax returns would have a deleterious effect sufficient to establish nexus).

In addition, petitioner's assertion that there was no evidence presented regarding the effect of his misconduct upon his job performance is simply incorrect. A commander from one of the units petitioner was responsible for supporting and the deciding official both testified that commanders would no longer use petitioner's services, causing a loss of efficiency for both MWR and the deployed Marine units. Pet. App. 5a-6a. The deciding official also testified that petitioner's misconduct had jeopardized the credibility and integrity petitioner needed to perform his job adequately. *Id.* at 44a. That testimony and the underlying determination of nexus are not, as petitioner contends, "unsupported, general assertions that such action is necessary to maintain the public confidence." Pet. 15,

18 (quoting *Bonet* v. *United States Postal Serv.*, 661 F.2d 1071, 1076 (5th Cir. 1981)). Instead, this testimony provided a proper basis for the Board's nexus determination and the court of appeals' affirmance of that determination. Pet. App. 44a; see *Allred*, 786 F.2d at 1131 (statements of subordinates in support of employee were not sufficient to overcome fact that direct supervisors had lost trust and confidence).

Petitioner also criticizes the decision because the court recognized that the social mores of the group petitioner was required to serve could properly be considered in evaluating the agency's demonstration of nexus. Pet. App. 11a. This recognition is reflected throughout the cases relied upon by petitioner. For example, if a Customs officer failed to file his tax returns in a timely manner, it might not be cause for removal from the Customs Service. A tax auditor, however, could be removed from the Internal Revenue Service for such an infraction. See *Giles*, 553 F.2d at 649. Similarly, a conviction for illegal drug use in off-duty hours may not provide the same justification for removal of an Internal Revenue Service employee as for a Customs officer who is charged with enforcing the nation's drug laws. See *Masino* v. *United States*, 589 F.2d 1048, 1056 (Ct. Cl. 1978). In this case, the court properly recognized that petitioner served the Marine community at Camp Lejeune and that his misconduct jeopardized his ability to provide services to that community. Pet. App. 11a.

Although petitioner does not raise the argument in his petition, Judge Linn's dissent took the view that the Board's and the majority's focus in the nexus analysis on the mission of the MWR department, rather than the mission of the Navy as a whole, constituted legal error. See Pet. App. 20a-21a. Judge Linn's opinion is based on

the absence of any case law in which "the mission of a unit smaller than the agency was considered." *Id.* at 20a. Judge Linn's criticism of the majority's analysis is not persuasive in the context of this case, however. Unlike many agencies in which the sole mission of the agency is to serve the public at large, the military services also have an important duty to care for and support the service men and women who carry out the agency's broader military mission. This fact is reflected in the court's determination that the MWR department's mission was to support service men and women on deployment as well as their families. *Id.* at 46a. Thus, the court of appeals and the Board properly focused on the role and mission of the MWR department rather than the mission of the Navy as a whole.

Finally, petitioner argues that the Federal Circuit's decision in this case creates a conflict among the circuits with regard to the scope of the nexus test. The scope of the nexus test set forth in the decision below is in accord with the Federal Circuit's prior precedents as well as those in other circuits. There is no conflict to be resolved by the Court.

First, as petitioner recognizes, the Federal Circuit has exclusive jurisdiction to consider appeals of MSPB decisions, pursuant to 5 U.S.C. 7703(b)(1) (1994 & Supp. V 1999), unless the employee's challenge raises a claim of discrimination under an enumerated federal statute, see 5 U.S.C. 7702(a)(1), 7703(b)(2). Thus, another circuit would have occasion to consider the application of the nexus standard only if it were presented in an appeal from a United States district court case which also involves an issue of discrimination. See *Williams* v. *Department of the Army*, 715 F.2d 1485, 1491 (Fed. Cir. 1983) (en banc). On those rare occasions when other circuits do consider the issue of nexus,

the standard of review remains the same—namely, whether the agency's demonstration of nexus is supported by substantial evidence in the record. See, *e.g.*, *Morales* v. *MSPB*, 932 F.2d 800, 802 (9th Cir. 1991) (in "mixed" cases involving both discrimination claims and civil service claims, the nondiscrimination claims are reviewed on the administrative record pursuant to 5 U.S.C. 7703(c)).

Second, contrary to petitioner's argument, there is no conflict among the circuits regarding the proper application of the nexus standard. In all the cases cited by petitioner, the courts clearly stated that an agency must demonstrate that the adverse action taken against the employee will promote the efficiency of the service, as required by 5 U.S.C. 7513(a). See, *e.g.*, *D.E.* v. *Department of the Navy*, 721 F.2d 1165, 1166, amended, 722 F.2d 455 (9th Cir. 1983). Then, in each of the cases, the court examined the nature of the evidence presented to the Board and determined whether it constituted "substantial evidence" to support the agency's nexus determination or the Board's decision that nexus had been established. See, *e.g.*, *Gloster* v. *GSA*, 720 F.2d 700, 705 (D.C. Cir. 1983) (nexus between employee misconduct underlying discharge and service efficiency not established by record evidence).

Similarly in this case the court of appeals recited the necessary showing for nexus and then conducted a review of the evidence presented to the Board. Pet. App. 3a. Based upon the testimony of the five agency witnesses and the evidence in the record regarding the job responsibilities of an MWR program manager, the court found that the agency's showing of nexus was supported by substantial evidence and affirmed the decision of the MSPB on this basis. *Id.* at 7a. The nexus requirement necessarily requires the Board to

engage in a fact-specific analysis that depends on the nature of the individual employee's responsibilities. Courts of appeals then review the Board's determination deferentially. The resulting decisions, like this one, tend to be highly fact-dependent and do not lend themselves to this Court's review.

At bottom, this petition for a writ of certiorari is based solely on a different view of the evidence presented to the Board regarding the nexus between petitioner's misconduct and the efficiency of the service. Petitioner's disagreement with the decision of the MSPB and the court of appeals' view of the evidence does not provide an adequate basis for further review of this case by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
DAVID M. COHEN
KATHRYN A. BLEECKER
MARIAN E. SULLIVAN
Attorneys

MAY 2001

(3)

Supreme Court, U.S.
FILED
[redacted] 8 [redacted]
CLERK

No. 00-1496

IN THE

Supreme Court of the United States

MICHAEL J. BROWN,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITIONER'S REPLY BRIEF TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK D. ROTH
General Counsel
CHARLES A. HOBBIE
Deputy General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.
Washington, D. C. 20001
(202) 639-6424

KEVIN M. GRILE *
Assistant General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
449 No. Clark Street, Ste. 300
Chicago, Illinois 60610
(312) 645-1803
* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

10 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITIONER'S REPLY BRIEF TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.....	1
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	Page
Giles v. United States, 553 F.2d 647 (Ct.Cl. 1977)	4-5
Masino v. United States, 589 F.2d 1048 (Ct.Cl. 1978)	4-5
United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963)	2
STATUTES:	
5 U.S.C. 7513(a)	1, 5

IN THE

Supreme Court of the United States

No. 00-1496

MICHAEL J. BROWN,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Department of the Navy argues that review of the decision of the Federal Circuit is not warranted because the decision below is simply the result of the appellate court's review of the administrative record. Respondent also argues that there is no conflict between the Federal Circuit's decision in the present case and the application of the nexus requirement by other circuits. Neither of these positions has merit.

While conceding that the nexus requirement set forth in 5 U.S.C. 7513(a) "is important" (Brief for the Respondent in Opposition (Opp.) 5), respondent endeavors to characterize the present case as simply involving an application of the "substantial evidence" standard with a "disagreement" by

petitioner with "the court of appeals' view of the evidence." Opp. 11. However, respondent badly misstates the premise for the present petition. The removal of Mr. Brown was justified on the bald assertions of Marine officials (and one volunteer coordinator who was the spouse of a Marine unit commander) that Marine unit commanders would hesitate to use Mr. Brown's services as a Program Manager because of a loss of "trust and confidence" in Mr. Brown and because of a perceived "mission impairment" as a result of the off-duty purported affair.[1] The issue before this Court is whether speculative testimony merely asserting discomfort and/or a perceived loss of credibility with utilizing an employee's civilian job services because of that employee's lawful off-duty activity is by itself adequate evidence of nexus so as to warrant removal of a civilian employee. For the reasons explained in the petition, the type of evidence asserted by respondent to be "substantial" is inadequate evidence of nexus. *See United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) ("substantial evidence" is a standard going to "the reasonableness of what the agency did *on the basis of the evidence before it*" (emphasis in original)).

In its opposition to the petition, respondent also maintains that a nexus finding based on a loss of trust and confidence

---

[1] Respondent's allusion to testimony of a loss of trust or confidence by "co-workers" (Opp. 5) is misleading. The agency employees or officers who were witnesses for respondent in the MSPB proceeding held positions of authority, including positions of direct authority over Mr. Brown. Petition for a Writ of Certiorari (Pet.) 4; Appendix (App.) 4a-7a, 16a-17a. MSPB Vice Chair Slavet correctly observed that there is no evidence that either co-workers of Mr. Brown (*i.e.*, nonsupervisory employees working with Mr. Brown) or rank and file Marines and their families objected to Mr. Brown's continued employment. App. 32a; *see also* App. 18a (Circuit Judge Linn's observation that there is no direct testimony from either Marines or their family members expressing discomfort with Mr. Brown's continued employment as a Program Manager).

can be justified because an agency "need not wait until the expected effect upon job performance or agency mission occurs before removing the employee." Opp. 6-7. Even accepting this position as correct, it simply begs the question of *what* future actions does respondent fear from Mr. Brown so as to cause the loss of trust and confidence. After all, for the assertions of respondent's witnesses to constitute adequate evidence of nexus, it is necessary that these fears of adverse future repercussion on job responsibilities be rationally based. Yet it is clear that *what* respondent presumably fears from Mr. Brown's continued employment is so irrational in nature that a nexus finding cannot be justified on this loss of "trust and confidence."

Specifically, Mr. Brown's job as Program Manager is to plan, develop and coordinate recreational events for Marines and their dependents. App. 2a, 16a-17a. Mr. Brown is not a "counselor" or "therapist" for Marine families. App. 16a-17a. There is no indication either that Mr. Brown, due to his off-duty activity, is unable to perform the planning, development and coordination duties of a Program Manager or that the quality of Mr. Brown's planning, development or coordination duties is impugned by any off-duty affair of Mr. Brown. *See* App. 15a (Circuit Judge Linn's description of the lack of evidence of any negative impact on Mr. Brown's job resulting from Mr. Brown's off-duty relationship). Rather, what prompts respondent's asserted loss of "trust or confidence" is the premise that Mr. Brown's continued employment will allow Mr. Brown to "woo" the spouse of a deployed Marine for purposes of a romantic and/or sexual liaison. Yet under the indisputable facts before this Court, announcement of a loss of trust or confidence based on such fears cannot justify a nexus finding.

First and foremost, any off-duty affair involving Mr. Brown did not arise out of the performance of Mr. Brown's civilian job duties (App. 9a) and there is no evidence to

suggest that Mr. Brown would use his job responsibilities to foster a personal relationship. Indeed, the spouse involved in Mr. Brown's purported affair was a woman Mr. Brown knew as a personal friend for years prior to the commencement of his civilian employment. The beginning of this friendship even occurred at a different location than the Marine base where Mr. Brown was employed as a civilian. Any relationship involving Mr. Brown was consensual, had no basis in the work arena, and resulted from a special affinity between the two persons not readily duplicated. There is no evidence to suggest that Mr. Brown, on the basis of this one-time relationship, is more likely to have an affair with the spouse of a deployed Marine in the future than any other person, civilian or Marine. To justify a nexus finding based on speculative fears of a future relationship, coupled with claims of lost "trust and confidence" would allow for any irrational belief, subjectively held, to similarly justify removal of a civilian employee. However, the nexus requirement contemplates a far more direct correlation between an employee's off-duty activity and the employee's job responsibilities than the claims of lost trust and confidence present here.

Respondent also takes issue with petitioner's position (Pet. 16) that the mores of the "Marine community" cannot provide the basis for a nexus finding in Mr. Brown's case. Opp. 8. In this regard, respondent cites *Giles v. United States*, 553 F.2d 647 (Ct.Cl. 1977), and *Masino v. United States*, 589 F.2d 1048 (Ct.Cl. 1978), as authorities for the proposition that an agency's mores may be considered in evaluating the agency's demonstration of nexus. However, respondent badly misreads both *Giles* and *Masino*. *Giles* involved an Internal Revenue Service agent who was responsible for the collection of delinquent tax payments and returns and who was removed after he failed to timely file his own returns. 553 F.2d at 648. *Masino* involved a customs inspector required to enforce laws against marijuana who was removed for his off-duty personal

use and transportation of marijuana. 589 F.2d at 1049. In both cases, a nexus was found, *not* because of the "mores" of the employing agency, but because the employee's off-duty conduct constituted a direct impairment of the agency's mission. *See Giles, supra* at 650; *Masino, supra*, at 1056. In turn, the impairment of the agency mission was found in both *Giles* and *Masino* not because of individual displeasure toward the subject conduct, but because the integrity of future job performance by the employee was impugned by the employee's off-duty activity. *See e.g., Giles, supra,* at 650 ("how must it appear to plaintiff's fellow workers, to revenue officials of the state, and to other members of the taxpaying public who know of it, that an agent of the IRS evaded compliance with so elementary, but fundamental, a requirement of the income tax system"); *Masino, supra*, at 1056 ("[s]ince possession and/or use of marijuana is a violation of federal criminal statutes, [plaintiff] was clearly not conducting himself in a manner to be expected of a Government employee engaged in law enforcement duties"). By contrast, the lawful off-duty conduct attributed to Mr. Brown does not cause impugnment of the integrity of his planning duties as a Program Manager.

The Federal Circuit's and respondent's reliance on the "mores" of the "Marine community" actually demonstrate how badly the Federal Circuit's decision has distorted the nexus requirement and how necessary it is for certiorari to be granted in this case. To conclude that a nexus is met because a person who benefits from Mr. Brown's services has knowledge of, and objects to, Mr. Brown's off-duty activities is tantamount to writing the nexus requirement out of 5 U.S.C. 7513(a). The business of government is to provide services to the public. The "logical" extension of the respondent's illogical position on "mores" is that a nexus can be found whenever a beneficiary of agency services objects to conduct attributed to a federal agency employee. Under this theory, for example, any off-duty conduct by an Internal

Revenue Service agent or a Department of Agriculture meat inspector can be the basis for employment discipline since these employees provide service benefitting the general public. Contrary to this theory, the nexus requirement is narrow and justifies employee discipline for off-duty activities "only" when the discipline is "for such cause as will promote the efficiency of the service."

Finally, the respondent also takes issue (Opp. 9-11) with petitioner's position that the Federal Circuit's decision in this case conflicts with the standards established for the application of the nexus requirement by other federal appellate courts. Nevertheless, respondent recognizes that federal appellate courts other than the Federal Circuit can address nexus issues in certain cases. Opp. 9-10. Moreover, other federal appellate courts have found, in contrast to the Federal Circuit's present decision, that a nexus between off-duty conduct and the "efficiency of the service" cannot be simply shown by bald claims of lost "trust and confidence," that evidence of an adverse impact on job performance is necessary to show nexus, and that more than simply immoral or deviant off-duty behavior must be shown to meet the nexus requirement. *See* Pet. 19-20 (description of case decisions by numerous appellate courts demonstrating the heavy burden placed on employer discipline by the nexus requirement).

Ultimately, the points raised by respondent fail to refute the need for certiorari shown in the pending petition. The Federal Circuit's decision is clearly erroneous and certiorari should be granted.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK D. ROTH
General Counsel
CHARLES A. HOBBIE
Deputy General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.
Washington, D. C. 20001
(202) 639-6424

KEVIN M. GRILE *
Assistant General Counsel
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
449 No. Clark Street, Ste. 300
Chicago, Illinois 60610
(312) 645-1803

* *Counsel of Record*